JUDICIAL

APPEAL

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. .....

ARGYLE R. MACKEY, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, and WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, APPELLANTS

v.

FRANCISCO MENDOZA-MARTINEZ

Appeal from the United States District Court for the Southern District of California, Northern Division

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JURISDICTIONAL STATEMENT

OPINION BELOW

The memorandum opinion of the District Court holding Section 401(j) of the Nationality Act of 1940, as amended, unconstitutional, is set forth in the Appendix, *infra*, pp. 12-22. The court's findings of fact and conclusions of law are also set forth in the Appendix, *infra*, pp. 23-25.

JURISDICTION

The judgment of the District Court declaring petitioner to be a citizen of the United States, for the reason that Section 401(j) of the Nationality Act of 1940, as amended, is unconstitutional, was entered October 20, 1958. Appendix, *infra*, pp. 25-26. A notice of appeal to this Court was filed in the District Court on November 17, 1958. The jurisdiction of this Court to review on direct appeal the decision of a District Court holding an act of Congress unconstitutional is conferred by 28 U.S.C. 1252.

QUESTION PRESENTED

Whether Congress has the constitutional power to provide, as it did in Section 401(j) of the Nationality Act of 1940, for the expatriation of a native-born citizen who, in time of war, voluntarily remained outside the jurisdiction of the United States for the purpose of evading service in the armed forces of the United States.

STATUTE INVOLVED

The Nationality Act of 1940 (54 Stat. 1137), as amended by the Acts of January 20, 1944 (58 Stat. 4), July 1, 1944 (58 Stat. 677) and September 27, 1944 (58 Stat. 746), provided in pertinent part:

> Section 401. A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * * *
>
> (j) Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President

to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States.[1]

STATEMENT

This is a suit by appellee to have himself declared a citizen of the United States. On September 6, 1955, the District Court for the Southern District of California, Northern Division, issued a Memorandum and Order [2] rejecting appellee's claim, brought under Section 503 of the Nationality Act of 1940, that he is a citizen of the United States for the reason that Section 401(j) of the Nationality Act of 1940, as amended, under which he had been deemed by the administrative authorities to have been denationalized, was unconstitutional.[3] In a *per curiam* opinion, rendered on November 2, 1956, the Court of Appeals for the Ninth Circuit affirmed. *Francisco Mendoza-Martinez* v. *Argyle R. Mackey*, 238 F. 2d 239. On December 12, 1956, a petition for a writ of certiorari was filed (No. 623, O.T. 1956) and on April 7, 1958, this Court (356 U.S. 258) granted the petition (No. 54, O.T. 1958), vacated the judgment of the Ninth Circuit, and remanded the cause to the District Court for reconsideration in light of this Court's decision in *Trop* v. *Dulles*, 356 U.S. 86.

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[1] Now incorporated into Section 349 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 267-268, 8 U.S.C. 1481.

[2] Findings of fact and conclusions of law were filed on September 22, 1955.

[3] Appellee raised no other defense.

Upon reconsideration in the District Court, the parties stipulated the facts as follows:—That appellee was born in the United States on March 3, 1922, and was a citizen of the United States by birth; that he was also, and had been ever since birth, a citizen and national of Mexico; that during 1942 appellee departed the United States and went to Mexico for the sole purpose of evading and avoiding training and service in the Armed Forces of the United States; that he remained in Mexico continuously from 1942 until on or about November 1, 1946, for that single purpose; that on June 23, 1947, upon his plea of guilty in the United States District Court for the Southern District of California, appellee was convicted of violating Section 11 of the Selective Service and Training Act of 1940, and was sentenced to imprisonment for a period of one year and a day; that on February 3, 1953, appellee was served with a warrant of arrest in deportation proceedings; that a hearing was held on May 25, 1953, before a Special Inquiry Officer who, on September 11, 1953, ordered appellee deported from the United States as an alien; and that on October 23, 1953, the Board of Immigration Appeals dismissed appellee's appeal.

On this record, the only issue is the validity of Section 401(j), under which the appellants claim that appellee has lost his United States nationality. Upon review of this Court's decisions in *Trop* v. *Dulles*, 356 U.S. 86, and in *Perez* v. *Brownell*, 356 U.S. 44, the District Court held Section 401(j) unconstitutional and granted appellee the relief

sought under Section 503. The District Court found Section 401(j) indistinguishable on the question of constitutionality from Section 401(g), involved in *Trop*, providing for loss of nationality on conviction for desertion from the armed forces.

THE QUESTION IS SUBSTANTIAL

The question of the validity of an act of Congress dealing with the significant problem of denationalization for leaving the country in order to evade military service during a period of national emergency is of manifest weight. We think that in reaching the conclusion that Section 401(j) is unconstitutional the District Court has misinterpreted the reach of the decisions of this Court in *Perez* v. *Brownell*, 356 U.S. 44, and *Trop* v. *Dulles*, 356 U.S. 86.[4] And the Court has already indicated that the constitutionality of Section 401(j) is an "important question." 256 U.S. at 62.[5]

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[4] Although it was an alternative basis for denationalization in *Perez*, the Court refrained from reaching the question of the validity of Section 401(j), commenting (356 U.S. at 62):

"Because of our view concerning the power of Congress with respect to § 401(e) of the Nationality Act of 1940, we find it unnecessary to consider—indeed, it would be improper for us to adjudicate—the constitutionality of § 401(j), and we expressly decline to rule on that important question at this time."

See also the Memorandum of Mr. Justice Whittaker, 356 U.S. at 85. Mr. Justice Brennan's opinion in *Trop* likewise indicates that he was not passing on the validity of Section 401(j) (356 U.S. at 110, esp. fn. 7).

[5] See the quotation from the *Perez* opinion in footnote 4, *supra*.

1. In *Perez*, the Court sustained Section 401(e), providing for loss of nationality by voting in a foreign political election. The decision is bottomed on the premise that loss of nationality may be decreed as a rational incident of Congressional authority over foreign affairs. Recognizing that the power over foreign affairs is inherent "in the law-making organ of the Nation" (356 U.S. 57), the Court went on to examine whether Section 401(e) relevantly and reasonably stemmed therefrom. Upon examination of the legislative history of that section, and the historical background of expatriation legislation, the Court found such a rational connection, concluding that Congress could reasonably believe that the legislation would deter and reduce embarrassing foreign embroilments and international friction which might otherwise develop as a result of uncontrolled political activity by American citizens in foreign lands (356 U.S. 59-62).

On the same day, in analyzing Section 401(g) (desertion from the armed forces in time of war following conviction by court-martial), the Court reached a contrary result in *Trop*. Four Justices, speaking through Mr. Chief Justice Warren, found the cancellation of citizenship under this provision to be penal in nature, only remotely stemming from the war powers, its alleged source, and, as applied to render an individual stateless, "cruel and unusual" punishment in violation of the Eighth Amendment. *Trop* v. *Dulles*, 356 U.S. 93-103. Mr. Justice Brennan concurring in the result, explained that while he had agreed with the Court in *Perez* that Section 401(e) rationally stemmed from Congress'

ultimate authority over foreign affairs, he thought Section 401(g) too indirectly and remotely connected with the war powers to sustain its validity. He noted that the provision was indiscriminately applicable whether desertion occurred in this country or abroad; that it was essentially penal in nature and as such generally ineffectual; and that it was less effective than the alternative sanctions not open to constitutional objection (356 U.S. 105-114).

The ultimate conclusions to be drawn from the holdings of these two cases with respect to the power of Congress to decree loss of nationality are, we believe, as follows:

(1) Congress may decree loss of nationality as an incident to its control over foreign affairs on a ground which is reasonably necessary to the regulation of foreign affairs.

(2) Congress may decree loss of nationality under the war powers where the necessity for that sanction in the exercise of those powers is clear and direct.

2. We submit that Section 401(j) can be sustained under both of these principles.[6]

(*a*). Section 401(j) is a reasonable exercise of Congressional power over foreign affairs. Unlike Section 401(g), involved in *Trop*, it affects *only* draft-evaders who remove themselves from the United States. It is limited to those "who flee to another land" (see Mr. Justice Brennan, commenting

[6] The history of Section 401(j) is set out in the Government's main brief in *Perez* (No. 572, Oct. Term, 1956; No. 44, Oct. Term, 1957), at pp. 41-46, 53-55, and in the Government's supplemental brief on reargument in Nos. 44, 19, and 70, Oct. Term, 1957, at pp. 11-17.

on subsection (g) in *Trop*, 356 U.S. at 107). It does not apply to draft-evaders who remain within this country. As a result, like Section 401(e), sustained in *Perez*, Section 401(j) has a direct relationship to foreign affairs.

A draft-evader who leaves or remains outside this country to avoid military service can cause international complications. In the eyes of the foreign power, such a person would still be an American citizen for whom the United States would be deemed responsible (at least to some degree) and on whom the United States could impose demands, even though he had fled the United States. If the draft-evader is also a national of the country in which he sought refuge—as in this case—his actions could place that nation in the difficult position of seeking a course of action which would protect its own nationals, while continuing friendly relations with another country which might be a strong ally. Cf. *Gonzales* v. *Landon*, 350 U.S. 920, where the dual national claimed, while living in Mexico (his other country), that he was exempt from American military service under an executive agreement between this country and Mexico.[7] Similarly, the United States, in time of national emergency, could well feel called upon to make representations to, or bring

[7] Appellee is also a national of Mexico (see the Statement, *supra*, p. 4). While the District Court pointed out that petitioner's conduct during his stay in Mexico was no different from that of other law-abiding Americans there on visas or passports, this does not change the potential danger to foreign relations posed by the dual-national status of a draft-evader.

pressure upon, other nations to make certain that they do not become refuges for citizen draft-evaders.[8] Again, the problem might become more complex if the evader was also a national of the host nation, or of a third nation that asserted an objection to our demand for his return.

On the other hand, by expatriating those who depart from this country with draft-evasion as their purpose, Congress has eliminated at the outset any further claim that this country would have to the services of these individuals and consequently has reduced the danger of potential conflict with the nation to which they have gone. As Mr. Justice Brennan noted with respect to the voting provision of Section 401(e) [*Trop*, 356 U.S. at 106]:

> * * * Congress has ordained the loss of citizenship simultaneously with the act of voting because Congress might reasonably believe that in these circumstances there is no acceptable alternative to expatriation as a means of avoiding possible embarrassments to our relations with foreign nations.

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[8] In H. Rept. No. 1229, 78th Cong., 2d Sess., pp. 1-2, which accompanied the bill that became Section 401(j), the conditions existing in 1944 are pointed out as follows:

"It is, of course, not known how many citizens or aliens have left the United States for the purpose of evading military service. The Department of Justice discovered that in the western district of Texas, in the vicinity of El Paso alone, there were over 800 draft delinquents recorded in the local Federal Bureau of Investigation office, born in this country and, therefore, citizens, who had crossed the border into Mexico for the purpose of evading the draft, but with the expectation of returning to the United States to resume residence after the war."

By the same token, Section 401(j) acts to avoid possible areas of international dispute and conflict and thus implements the regulation of foreign affairs; as such, it is a reasonable Congressional exercise of the foreign affairs power.

(*b*). Secondly, Section 401(j) differs from subsection (g) in that it is more directly related to the war powers and national defense. Unlike desertion which carries the sanction of court-martial and imprisonment, no similar primary check exists to deter those individuals who would otherwise flee this country to avoid fulfilling their military obligations. Draft-evaders outside the country cannot be apprehended and imprisoned for their departure or failure to return. Only if they return to this country, after they have accomplished their purpose and avoided service in time of danger, would it be possible to enforce against them the criminal sanctions of the selective service laws. This would not aid in raising an army when it is needed. As the legislative history set forth in the government's briefs in *Perez* shows (see footnote 6, *supra*, p. 7), Congress felt that, for the difficult task of raising an army in war time, it needed the immediate deterrent represented by loss of nationality for evasion by flight abroad. Congress thus felt that denationalization in this instance was a necessary exercise of the war power, and its judgment in this respect was not unreasonable. This is not a situation where alternative methods are available; rather, it is a case where the only meaningful restraint which would not provoke foreign embroilments is expatriation.

Moreover, the draft-evader who seeks a foreign refuge deliberately keeps himself beyond the reach of United States criminal sanctions designed to compel him to fulfill his high duty. He is repudiating not only his military obligation but his wider obligation as a citizen to submit to this nation's justice; he rejects all authority of the United States over him, not merely his duty to serve. Dissolution of his ties to the nation cannot be deemed arbitrary.

CONCLUSION

In sum, Section 401(j) constitutes a fair exercise of Congressional authority reasonably calculated to implement both the Congressional authority over foreign affairs and to wage war. Its validity should be upheld on these grounds.

It is respectfully submitted that, for the foregoing reasons, the Court should note jurisdiction of this appeal.

J. LEE RANKIN,
Solicitor General.

MALCOLM ANDERSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

JANUARY 1959.

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

Civil No. 1314-ND

FRANCISCO MENDOZA-MARTINEZ, PLAINTIFF,

v.

ARGYLE R. MACKEY, The Commissioner of Immigration and Naturalization, and WILLIAM P. ROGERS, Attorney General of the United States, Defendants.

MEMORANDUM AND ORDER

On the 22nd day of September, 1955, this Court entered judgment in the above cause, which judgment adjudicated and decreed that the plaintiff lost his United States citizenship and nationality through expatriation by remaining outside the jurisdiction of the United States after September 27, 1944, at time of war and during a period declared by the President of the United States to be a period of national emergency, for the purpose of evading and avoiding training and service in the land and naval forces of the United States. This judgment was affirmed by the Court of Appeals for the Ninth Circuit on November 2, 1956. (238 Fed. 2d 239)

On April 7, 1958, the Supreme Court of the United States vacated the judgment and remanded the cause "to the United States District Court for determination in light of *Trop* v. *Dulles*, ante, p. 86, decided March 31, 1958". (356 U.S. 258)

Pursuant to the order of the Supreme Court a hearing was held on July 10, 1958. The plaintiff was represented by DiGiorgio and Davis, Thomas R. Davis appearing, and the defendant was represented by Laughlin E. Waters, United States Attorney, James R. Dooley, Assistant United States Attorney, appearing.

At the original trial, the only issue presented to the Court for determination was the constitutionality of Section 401(j) of the Nationality Act of 1940 54 Stat. 1137) as amended, the parties having stipulated that the plaintiff, a citizen of the United States by birth, at the age of 20 and while subject to the Selective Service and Training Act, (Title 50 App. U.S.C.A. 312 et seq) in the year 1942 departed from the United States for the Republic of Mexico for the sole purpose of evading and avoiding training and service in the armed forces of the United States, and remaining in Mexico continuously from some time in 1942 until on or about November 1, 1946, for the sole purpose of evading and avoiding such training and service.

At the hearing held on July 10, 1958, the cause was submitted to the Court for determination on a trial stipulation of the parties containing the following provisions:

1. Plaintiff was born in the United States on March 3, 1922, and thus was a citizen of the United States by birth.

2. Under the law of Mexico, plaintiff, now and ever since his birth, has been a citizen and national of the Republic of Mexico.

3. During 1942 plaintiff departed from the United States and went to Mexico for the sole purpose of evading and avoiding training and service in the Armed Forces of the United States.

4. Plaintiff remained in Mexico continuously from sometime during 1942 until on or about November 1, 1946 for the sole purpose of evading and avoiding training and service in the Armed Forces of the United States.

5. On June 23, 1947, plaintiff upon his plea of guilty was convicted in the United States District Court for the Southern District of California for violation of Section 11 of the Selective Service and Training Act of 1940. He was sentenced to imprisonment for a period of one year and a day.

6. On February 3, 1953, a warrant of arrest in deportation proceedings was served upon the plaintiff. Pursuant to this warrant, a deportation hearing was held on May 25, 1953; and on September 11, 1953, the Special Inquiry Officer who presided at the hearing rendered his decision, ordering that plaintiff be deported from the United States as an alien.

7. Plaintiff appealed the decision of the Special Inquiry Officer to the Board of Immigration Appeals, Department of Justice, and on October 23, 1953, said Board dismissed plaintiff's appeal.

8. Issues of fact to be tried: None.

9. Issues of law: Is Section 401(j) of the Nationality Act of 1940 unconstitutional, either on its face or as applied to the plaintiff?

The trial stipulation provided that the cause would be submitted to the Court for decision on said stipulation and on all of the records, files and evidence theretofore received.

The proof in this cause is conclusive that the plaintiff, a citizen of the United States, departed from the United States for the Republic of Mexico for

the sole purpose of evading and avoiding training and service in the armed forces of the United States, and remained in Mexico continuously from some time in 1942 until on or about 1946 for the sole purpose of evading and avoiding such training and service.

I have reconsidered this case in light of *Trop* v. *Dulles*, 356 U.S. 86, as directed by the Supreme Court. The Trop case did not involve Section 401(j) of the Nationality Act of 1940, but involved Section 401(g) of that Act which provides that a citizen shall lose his nationality "by deserting the military or naval forces of the United States in time of war, provided he is convicted thereof by a court martial and as a result of such conviction is dismissed or dishonorably discharged from the service of such military or naval forces; * * * "

In the Trop case, the Chief Justice, in an opinion joined by Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Whittaker, concluded that even if citizenship could be divested in the exercise of some governmental power, Section 401(g) violates the Eighth Amendment because it is penal in nature and prescribes a "cruel and unusual punishment".

Mr. Justice Black in an opinion joined by Mr. Justice Douglas concurred in the opinion of the Chief Justice and expressed the view that even if citizenship could be involuntarily divested, the power to denationalize cannot be placed in the hands of military authorities.

Mr. Justice Brennan concluded that it lies beyond the power of Congress to enact Section 401(g) because "the requisite rational relation between this statute and the war power does not appear * * *".

On the same day as the decision in the Trop case, the Supreme Court rendered its decision in *Perez* v. *Brownell*, (356 U.S. 44). In that case the petitioner, a national of the United States by birth, had

been declared to have lost his American citizenship by operation of Section 401(e) and Section 401(j) of the Nationality Act of 1940 as amended. Section 401 of that Act provided that "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by: * * * (e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory. * * * (j) Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States."

Mr. Justice Frankfurter delivered the opinion of the Court which held Section 401(e) to be constitutional. In a closing paragraph of the opinion it is stated: "It cannot be said, then, that Congress acted without warrant when, pursuant to its power to regulate the relations of the United States with foreign countries, it provided that anyone who votes in a foreign election of significance politically in the life of another country shall lose his American citizenship. To deny the power of Congress to enact the legislation challenged here would be to disregard the constitutional allocation of governmental functions that it is this Court's solemn duty to guard." (356 U.S. 62.)

In the closing paragraph of that opinion it is stated:

"Because of our view concerning the power of Congress with respect to Section 401(e) of the Nationality Act of 1940, we find it unnecessary to consider—indeed, it would be improper for us to adjudicate—the constitutionality of Section 401(j), and

we expressly decline to rule on that important question at this time."

In his opinion in the Trop case, the Chief Justice stated: "Since a majority of the Court concluded in *Perez* v. *Brownell*, that citizenship may be divested in the exercise of some governmental power, I deem it appropriate to state additionally why the action taken in this case exceeds constitutional limits, even under the majority's decision in Perez. The Court concluded in *Perez* that citizenship could be divested in the exercise of the foreign affairs power. In this case, it is urged that the war power is adequate to support the divestment of citizenship. But there is a vital difference between the two statutes that purport to implement those powers by decreeing loss of citizenship. The statute in *Perez* decreed loss of citizenship—so the majority concluded—to eliminate those international problems that were thought to arise by reason of a citizen's having voted in a foreign election. The statute in this case, however, is entirely different. Section 401(g) decrees loss of citizenship for those found guilty of the crime of desertion. It is essentially like Section 401(j) of the Nationality Act, decreeing loss of citizenship for evading the draft by remaining outside the United States. This provision was also before the Court in *Perez*, but the majority declined to consider its validity. While Section 401(j) decrees loss of citizenship without providing any semblance of procedural due process whereby the guilt of the draft evader may be determined before the sanction is imposed, Section 401(g), the provision in this case, accords the accused deserter at least the safeguards of an adjudication of guilt by a court-martial."

After studying the opinion rendered by the Supreme Court in the Trop and Perez cases, I have concluded

that the law which must govern my re-consideration of the case under review is that Congress has the power to divest citizenship if a rational nexus exists between the content of a specific power in Congress and the action of Congress in carrying that power into execution, unless the action of Congress runs afoul of some provision of the Constitution, such as in the Trop case, the Eighth Amendment.

It is my view that the only powers of Congress which need to be considered in the reconsideration of this case are (1) the power to regulate foreign affairs which power is fully set forth in the Perez case, and (2) the war powers of Congress set forth in Article 1, Section 8, Clauses 1, 11, 12, 13, 14 and 18 of the Constitution of the United States.

It is the position of counsel for the defendant that Congress had the power to enact Section 401(j) under its powers to regulate foreign affairs and relied upon the Perez case in support of his position. In the Perez case the petitioner voted in a politically significant election while living in Mexico, which act was construed in the Perez case "as importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship." and as stated in the majority opinion in the Perez case, "makes the act potentially embarrassing to the American government and pregnant with the possibility of embroiling this country in disputes with other nations."

The petitioner's act in departing for Mexico for the purpose of evading training and service in the armed forces is to be condemned. It was an act for which he should have been and was punished. Such conduct, however, does not show a renunciation of

his citizenship or an allegiance to a foreign power. While physically present in Mexico the petitioner committed no act which would import a dilution of his American citizenship or which might conceivably embarrass our government. So far as the record in this case shows, the conduct of the petitioner in Mexico was no different than the conduct of law-abiding American citizens who were lawfully in Mexico on visas or passports. It could not be contended that their physical presence in Mexico was a dilution of their American citizenship or that their presence there might be potentially embarrassing to the American government. I am unable to find any rational relationship between the power of Congress to regulate foreign affairs and the enactment by Congress of Section 401(j).

Under the so-called "war powers", Congress has the power to provide for the common defense; to declare war; to raise and support armies; to make rules for the government and regulations of the land and naval forces; and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.

Is there a rational relationship between the powers above described and the enactment of Section 401(j)? Conceivably, Congress may have thought that making loss of citizenship a consequence of departing from the United States, or remaining out of the United States in time of war for the purpose of evading or avoiding training and service in the land and naval forces of the United States would deter citizens subject to such training and service from evading such service in such manner, and would thereby assist the authorities in raising the requisite manpower to successfully prosecute a war or provide for the common defense, or conceivably, Congress may have

thought that the morale of those who were subject to such service and training or those who had already been drafted into the service would be increased and thereby the efficiency of the armed forces might be improved.

Congress, however, enacted the Selective Service and Training Act of 1940, as amended, (50 App. U.S.C.A.). Section 311 thereof dealt with offenses and punishment under that Act. Said section provided, in substance, that any person who shall knowingly fail or neglect to perform any duty required by the Act or the rules and regulations made or directions given thereunder, or who shall otherwise evade registration and service in the land or naval forces, shall, upon conviction, be punished by imprisonment for not more than five years, or by a fine of not more than $10,000.00, or by both such fine and imprisonment. The penalty applies regardless of whether the violation is by departing from the United States or in some other manner. In the instant case, the plaintiff departed from the United States for the purpose of evading service in the land and naval forces of the United States. He committed a felony for which he was subject to trial and punishment. For such violation, the plaintiff was punished by incarceration for a period of one year and one day and also suffered the loss of rights which resulted from conviction of a felony. If the plaintiff had remained in the United States and had evaded service under the Selective Service and Training Act, he would have committed the same offense and would have suffered the penalty provided for such violation, but he would not have been subject to expatriation.

It is my conviction that the enactment of Section 311 accomplished all legitimate purposes that Congress could have reasonably considered in the enact-

ment of Section 401(j) and the war powers of Congress is extremely tenuous and ineffectively remote. I am unable to find that the enactment of Section 401(j) could be reasonably calculated to implement war powers possessed by Congress.

My views on Section 401(j) are similar to the views entertained by Mr. Justice Brennan on Section 401(g) in his concurring opinion in *Trop* v. *Dulles*. Mr. Justice Brennan stated in the last paragraph of that opinion as follows:

> "I therefore must conclude that Section 401(g) is beyond the power of Congress to enact. Admittedly, Congress' belief that expatriation of the deserter might further the war effort might find some—though necessarily slender—support in reason. But here, any substantial achievement, by this device, of Congress' legitimate purposes under the war power seems fairly remote. It is at the same time abundantly clear that these ends could more fully be achieved by alternative methods not open to these objections. In the light of these factors, and conceding all that I possibly can in favor of the enactment, I can only conclude that the requisite rational relationship between this statute and the war power does not appear—for in this relation the statute is not 'really calculated to effect any of the objects entrusted to the government * * *', McCulloch v. Maryland, 4 Wheat. 316, 423—and therefore that Section 401(g) falls beyond the domain of Congress."

For the reasons herein expressed, I hold that Section 401(j) is unconstitutional and therefore the plaintiff is entitled to the relief sought in his amended complaint.

Counsel for the plaintiff is directed to prepare an
lodge proposed findings of fact, conclusions of la
and form of judgment consistent with the view
herein expressed.

The Clerk of this Court is directed to forthwit
mail copies of this memorandum to all counsel.

Dated: September 24th, 1958.

GILBERT M. JERTBERG
Judge, United States District Cou

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

No. 1314-ND

FRANCISCO MENDOZA-MARTINEZ, PLAINTIFF,

v.

ARGYLE R. MACKEY, The Commissioner of Immigration and Naturalization; and WILLIAM P. ROGERS, Attorney General of the United States,

DEFENDANTS

FINDINGS OF FACT, CONCLUSIONS OF LAW and JUDGMENT

FINDINGS OF FACT

1. Plaintiff was born in the United States on March 3, 1922, and thus was a citizen of the United States by birth.

2. Under the law of Mexico, plaintiff, now and ever since his birth, has been a citizen and national of the Republic of Mexico.

3. During 1942 plaintiff departed from the United States and went to Mexico for the sole purpose of evading and avoiding training and service in the Armed Forces of the United States.

4. Plaintiff remained in Mexico continuously from sometime during 1942 until on or about November 1, 1946, for the sole purpose of evading and avoiding training and service in the Armed Forces of the United States.

5. On June 23, 1947, plaintiff upon his plea of guilty was convicted in the United States District Court for the Southern District of California for violation of Section 11 of the Selective Service and Training Act of 1940. He was sentenced to imprisonment for a period of one year and a day.

6. On February 3, 1953, a warrant of arrest in deportation proceedings was served upon the plaintiff. Pursuant to this warrant, a deportation hearing was held on May 25, 1933; and on September 11, 1953, the Special Inquiry Officer who presided at the hearing rendered his decision, ordering that plaintiff be deported from the United States as an alien.

7. Plaintiff appealed the decision of the Special Inquiry Officer to the Board of Immigration Appeals, Department of Justice, and on October 23, 1953, said Board dismissed plaintiff's appeal.

8. On the 22nd day of September, 1955, this Court entered judgment in the above cause, which judgment adjudicated and decreed that the plaintiff lost his United States citizenship and nationality through expatriation by remaining outside the jurisdiction of the United States after September 27, 1944, in time of war and during a period declared by the President of the United States to be a period of national emergency, for the purpose of evading and avoiding training and service in the land and naval forces of the United States.

9. This judgment was affirmed by the Court of Appeals for the Ninth Circuit on November 2, 1956.

10. On April 7, 1958, the Supreme Court of the United States vacated the judgment and remanded the cause "to the United States District Court for determination in light of *Trop* v. *Dulles*, ante, p. 86, decided March 31, 1958."

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and over this cause.

2. Section 401j of the Nationality Act of 1940, a 1944 Amendment, under which defendant claims the plaintiff lost his United States citizenship, is unconstitutional.

3. Plaintiff should be declared to be a citizen of the United States.

4. Any and all prior orders or decrees by the Commissioner of Immigration and Naturalization, by the Board of Immigration Appeals, or by any other board or person whomsoever, declaring the plaintiff to be an alien and to have lost his United States citizenship, and any such order or decree directing that plaintiff be deported from the United States, should be declared null and void and of no further force or effect.

JUDGMENT

The above entitled cause having come on regularly for hearing on the 10th day of July, 1958, before the Hon. Gilbert H. Jartberg, Judge Presiding without a jury, the plaintiff being represented by his attorneys DiGiorgio and Davis, by Thomas R. Davis, and the defendants being represented by their attorneys, Laughlin E. Waters, United States Attorney, Richard A. Lavine, Assistant U. S. Attorney, and James R. Dooley, Assistant U. S. Attorney, by James R. Dooley; and the facts having been submitted by written stipulation and written memorandum having been submitted by defendants only, and oral argument having been heard; it is hereby

ORDERED, ADJUDGED AND DECREED that Section 401j of the Nationality Act of 1940, a 1944 Amendment,

is unconstitutional; that plaintiff is a citizen of the United States; that any and all prior orders or decrees by the Commissioner of Immigration and Naturalization, by the Board of Immigration Appeals, or by any other board or person whomsoever, declaring the plaintiff to be an alien and to have lost his United States citizenship, and any order or decree directing that plaintiff be deported from the United States be, and the same hereby is, declared null and void and of no further force or effect.

DATED: This 20th day of October, 1958.

GILBERT H. JERTBERG
Judge, U. S. District Court

U. S. GOVERNMENT PRINTING OFFICE 1959 493171 877

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Office-Supreme Court, U.S.
FILED
MAR 13 1968

No. 282

In the [illegible]

[illegible]

ARNOLD E. [illegible], [illegible] OF IMMIGRATION AND NATURALIZATION, AND [illegible], ATTORNEY GENERAL OF THE UNITED STATES, APPELLANTS

v.

[illegible]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

SUPPLEMENTAL MEMORANDUM FOR THE APPELLANTS

[illegible]
Solicitor General
[illegible]
Assistant Attorney General
[illegible]
Assistant to the Solicitor General
[illegible]
Attorneys
Department of Justice, Washington, D.C. 20530

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 29

ARGYLE R. MACKEY, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, AND WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, APPELLANTS

v.

FRANCISCO MENDOZA-MARTINEZ

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

SUPPLEMENTAL MEMORANDUM FOR THE APPELLANTS

This memorandum is submitted in response to three questions as to which the Court requested, on March 1, 1960, that the parties file a response. These three questions are as follows:

> (1) Was the judgment of conviction of appellee for draft evasion premised in any respect upon his citizenship status after the date of enactment of Section 401(j)?
>
> (2) If so, does the judgment of conviction for any reason foreclose litigation of the appellee's citizenship in the present case?
>
> (3) Are the foregoing questions appropriate for the Court's consideration?

I

QUESTION (1): *Was the judgment of conviction of appellee for draft evasion premised in any respect upon his citizenship status after the date of enactment of Section 401(j)?* We think not.

1. Count One of the indictment (a copy of which is set forth in Appendix A, *infra,* pp. 11–13), which was the count to which appellee pleaded guilty, after alleging that appellee was "a male person within the class made subject to selective service," and that he had "registered as required by said act and the regulations promulgated thereunder and became a registrant of Local Board 137," charged that

> on or about November 15, 1942, in violation of the provisions of said act and the regulations promulgated thereunder, the defendant did knowingly evade service in the land or naval forces of the United States of America in that he did knowingly depart from the United States and go to a foreign country, namely: Mexico, for the purpose of evading service in the land or naval forces of the United States and did there remain until on or about November 1, 1946.

Count Two of the indictment charged appellee with failure to report for induction on December 11, 1942, as ordered. Count Three charged appellee with failure to keep the draft board advised of the address where mail would reach him.

District Judge Yankwich, in sentencing appellee to a year and a day of imprisonment upon his plea of guilty to Count One, noted (Appendix A, *infra,* p. 15):

> It is further ordered that the second and third counts be dismissed, it appearing to the court that the offences charged therein arose out of the same circumstances.

2. The prosecution was based upon appellee's evasion of his liability for induction, which in turn was based on his status in 1942. He was "a male person within the class made subject to selective service," a class which comprised both citizens and non-citizens. The Selective Training and Service Act of 1940, 54 Stat. 885, as amended, December 20, 1941, ch. 602, 55 Stat. 845, provided in Section 3(a) that all male persons residing in the United States, as well as all male citizens, whether residing in the United States or not, were subject to the draft. 50 U.S.C. App. 303 (1940 ed., Supp. I) (see Appendix B, *infra*, pp. 19–20). Appellee, therefore, as a male person residing in the United States who was of a certain age, was liable for induction irrespective of whether he happened to be or continued to be a citizen of the United States. The Government at no time in the prosecution asserted appellee's citizenship as a basis for his liability for induction, nor did the statute require any such assertion. Appellee, as a resident of the United States, was in the statutory class eligible for training and service, quite apart from his citizenship. Citizenship was not at all an issue.

3. Moreover, as appears from the dismissed second count together with Judge Yankwich's notation (quoted *supra*), appellee was ordered to report for induction on December 11, 1942, and the charge in the first count, of evasion of service, would neces-

upon the tie of citizenship, but also upon residence. For instance, aliens abroad, including alien draft evaders, who still claimed residence in this country would continue to be subject to selective service even while they remained abroad.

In sum, appellee's citizenship (past or present) would not necessarily be involved at all in the charge against him in the 1947 criminal prosecution and conviction; his citizenship was not in fact involved due to his plea of guilty; and his citizenship after September 27, 1944 (the date of enactment of Section 401(j)) was certainly not involved. Accordingly, his 1947 judgment of conviction was not premised in any respect upon his citizenship status after September 27, 1944.

II

QUESTION (2): *If so, does the judgment of conviction for any reason foreclose litigation of the appellee's citizenship in the present case?*

Since it is the Government's contention that the judgment of conviction was not premised in any respect upon appellee's citizenship status after the point in time when Section 401(j) would apply to divest him of that citizenship, no answer on our part to this question is required.

However, even if it be the conclusion of the Court that the judgment of conviction *may* somehow have involved the citizenship of appellee after September 27, 1944, this holding would not suffice in itself to bring into play the doctrines of res judicata or collateral estoppel, since those doctrines are premised

on the assumption that the issue in question has necessarily, or in fact, been decided in the previous litigation. *Fauerweather* v. *Ritch,* 195 U.S. 276, 307; *Emich Motors* v. *General Motors,* 340 U.S. 558, 568–569; *Partmar Corp.* v. *Paramount Corp.,* 347 U.S. 89, 90–91, 99 (fn. 6). We have pointed out that, in our view, the criminal proceeding did not necessarily, or in actual fact, decide anything as to appellee's citizenship, at least his citizenship after September 27, 1944.

If the Court's second inquiry posits a judicial holding that the judgment of conviction in 1947 *necessarily* implied a determination that appellee was a citizen at a time during which the Government now contends he was no longer an American, it might be that even in that event the Government would not technically be bound as a matter of res judicata or collateral estoppel by the prior judgment for the reason, *e.g.,* that it was the prevailing party and could not appeal, *Partmar Corp.* v. *Paramount Corp., supra,* 347 U.S. at 99 (fn. 6). However, we would refrain on policy grounds from urging such a position, and would in that event concede the inapplicability of Section 401(j) to appellee (if the issue may appropriately be considered by the Court).

III

QUESTION (3): *Are the foregoing questions appropriate for the Court's consideration?*

Appellee, the party plaintiff in the District Court, based his case solely and exclusively on the constitutionality of Section 401(j), deliberately raising no

other issue.[3] No other issue was canvassed or decided by the District Court. The Government's appeal to this Court presented no question other than the constitutionality of Section 401(j), and appellee has not raised any other issue in this Court. The Court's rules declare that "Only the questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the court" (Rule 15(c)(1); see also Rule 40(d)).

It is true that an appellee or respondent can urge any argument in support of the judgment below, including points not passed upon or rejected below, but this right has been restricted to arguments actually made by the appellee and based upon or arising out of the record in the case; it has not been extended to contentions dehors that record and not raised by the party.[4] In this case, appellee has not raised the point that he was conclusively determined to be a citizen in 1947, and the record does not contain the indictment, plea, or judgment (on which a claim that appellee's citizenship had already been determined would have to rest) but merely a stipulation that he had been con-

---

[3] R. 4, 5–6, 7. See also the colloquy between counsel for appellee and the District Judge transcribed at pages 20–21 of the Transcript of Record when the case was previously before this Court (No. 54, O.T. 1957), indicating clearly that the constitutional issue was the only one raised.

[4] *Jaffke* v. *Dunham*, 352 U.S. 280; *United States* v. *Raines*, No. 64, this Term, slip op., p. 9; *Langnes* v. *Green*, 282 U.S. 531, 538–539; *Story Parchment Co.* v. *Paterson Co.*, 282 U.S. 555, 567–568; *United States* v. *Ballard*, 322 U.S. 78, 88; *Walling* v. *General Industries Co.*, 330 U.S. 545, 547; *United States* v. *American Railway Express Co.*, 265 U.S. 425, 435–436.

victed upon his plea of guilty "for violation of Section 11 of the Selective Service and Training Act of 1940" (R. 3, see also R. 6, 14).

Assuming that the Court may properly consider the issue on the basis of the present record, the Court will be faced with the problem whether to exercise its discretion to consider it at this late date. On the one hand, the Court has refused to deal with subordinate issues duly spread upon the record but raised belatedly by an appellee or respondent, even in a case with strong constitutional overtones (*Wiener* v. *United States*, 357 U.S. 349, 351, fn.). Also, the validity of Section 401(j) has been much litigated (three times in this Court) and an authoritative ruling is desirable for the guidance of the lower courts and the administrators. On the other hand, there is the principle of avoiding a holding of constitutional invalidity where fairly possible. Appellee's American citizenship is also at stake, and this is an important factor. On balance, since our view is that there is so little ground for saying that appellee's citizenship status has already been definitively decided, we believe that this issue should not and need not be canvassed by the Court. But if the Court should be convinced on this record that appellee's citizenship was authoritatively

determined in his favor in the 1947 criminal proceeding, we would not oppose a resolution of the case on that basis.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
MALCOLM RICHARD WILKEY,
Assistant Attorney General.
OSCAR H. DAVIS,
Assistant to the Solicitor General.
PAUL J. KOMIVES,
Attorney.

MARCH 1960.

APPENDIX A

In the District Court of the United States in and for the Southern District of California, Northern Division

APRIL 1947 TERM

No. 2771

UNITED STATES OF AMERICA, PLAINTIFF

v.

FRANK MARTINEZ MENDOZA, DEFENDANT

INDICTMENT

[U.S.C., Title 50, App., Sec. 311—Selective Training and Service Act, 1940, as amended]

The grand jury charges:

COUNT ONE

[U.S.C., Title 50, App., Sec. 311]

Defendant Frank Martinez Mendoza, a male person within the class made subject to selective service under the Selective Training and Service Act of 1940, as amended, registered as required by said act and the regulations promulgated thereunder and became a registrant of Local Board No. 137, said board being then and there duly created and acting, under the Selective Service System established by said act, in Kern County, California, in the Northern Division of the Southern District of California; and on or about November 15, 1942, in violation of the provisions of said act and the regulations promulgated thereunder, the

defendant did knowingly evade service in the land or naval forces of the United States of America in that he did knowingly depart from the United States and go to a foreign country, namely: Mexico, for the purpose of evading service in the land or naval forces of the United States and did there remain until on or about November 1, 1946.

COUNT TWO

[U.S.C., Title 50, App., Sec. 311]

Defendant Frank Martinez Mendoza, a male person within the class made subject to selective service under the Selective Training and Service Act of 1940, as amended, registered as required by said act and the regulations promulgated thereunder and became a registrant of Local Board No. 137, said board being then and there duly created and acting, under the Selective Service System established by said act, in Kern County, California, in the Northern Division of the Southern District of California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class I-A and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on December 11, 1942, in Kern County, California, in the division and district aforesaid; and at said place, on or about December 11, 1942, and at all times thereafter, the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and there knowingly failed and negelected to report for induction into the armed forces of the United States as so notified and ordered to do.

COUNT THREE

[U.S.C., Title 50, App., Sec. 311]

Defendant Frank Martinez Mendoza, a male person within the class made subject to selective service under the Selective Training and Service Act of 1940, as amended, registered as required by said act and the regulations promulgated thereunder and became a registrant of Local Board No. 137, said board being then and there duly created and acting, under the Selective Service System established by said act, in Kern County, California, in the Northern Division of the Southern District of California; and on or about December 1, 1942, and at all times thereafter, in Kern County, California, within the division and district aforesaid, the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he knowingly failed and neglected to keep said Local Board No. 137 advised of the address where mail would reach him.

A true bill:

_____,
Foreman.

JAMES M. CARTER,
United States Attorney.

RHK:AH.

JUDGMENT AND COMMITMENT ON THE FIRST COUNT

District Court of the United States, Southern District of California, Northern Division

No. 2771

UNITED STATES

v.

FRANK MARTINEZ MENDOZA

Criminal[1] in Three Counts for Violation of U.S.C., Title 50, App., Sec. 311, Selective Training and Service Act, Secs. 1940, as Amended

On this 23rd day of June, 1947, came the United States Attorney, and the defendant Frank Martinez Mendoza, appearing in proper person, and[2] without counsel and defendant having been informed of his right to counsel and a jury trial and having waived the same, and,

The defendant having been convicted on[3] his plea of guilty of the offense charged in the[1] first count in the above-entitled cause, to wit:[4] Having on or about November 15th, 1942, knowingly departed from the United States to Mexico, for the purpose of evading service in the land or naval forces of the United States and having remained there until on or about November 1st, 1946, and the defendant having been

---

[1] Indictment or information.

[2] Insert (*a*) "by counsel" or (*b*) "having been advised of his constitutional right to counsel and having been asked whether he desired counsel assigned by the Court, replied that he did not," whichever is applicable.

[3] Insert the words "his plea of guilty," "plea of nolo contendere," or "verdict of guilty," as the case may be.

[4] Name specific offense or offenses and specify counts upon which convicted.

now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of[5] one year and one day in an institution of the penitentiary type, on the first count.

It is further ordered that[6] the second and third counts be dismissed, it appearing to the court that the offences charged therein arose out of the same circumstances.

The court does not deem a reference necessary to the Probation Office prior to sentence.

It is further ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein[7] on the first count.

(Signed) Leon R. Yankwich,
LEON R. YANKWICH,
United States District Judge.

---

[5] Insert sentence and any provision for payment of fine and state whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin; that is, with reference to termination of preceding term, or with respect to any other outstanding or unserved sentence.

[6] Indicate any order with respect to suspension and probation.

[7] Certified copy to accompany defendant to institution.

The Court recommends commitment to [8] Penitentiary type institution.

A True Copy. Certified this 23rd day of June 1947.

(Signed) EDMUND L. SMITH, *Clerk.*
FRANCIS E. CROSS,
(By) Francis E. Cross,
Deputy Clerk.

No. ____

UNITED STATES

v.

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on _____ to _____.

Defendant noted appeal on _____ and released on _____.

Did on _____. Did not _____ elect to enter upon service of sentence.[1]

Defendant's appeal determined on _____.

Defendant surrendered on _____.

Defendant delivered on July 15, 1947, to Federal Road Camp at McNeil Island, Washington, the insti-

---

[8] For use of Court wishing to recommend a particular institution.

[1] Strike out words not applicable and insert date if election is made.

tution designated by the Attorney General, together with certified copy of the within Judgment and Commitment.

ROBERT E. CLARK,
U.S. Marshal.
By T. R. KEEFE,
Deputy.

Filed August 5, 1947.

EDMUND L. SMITH,
Clerk.
By MAXINE LEAVIS,
Deputy Clerk.

APPENDIX B

The Selective Training and Service Act of 1940, 54 Stat. 885, as amended December 20, 1941, ch. 602, 55 Stat. 844 (50 U.S.C. App. 302, *et seq.* (1940 ed., Supp I)) provided in pertinent part:

> SEC. 2. Except as otherwise provided in this Act, it shall be the duty of every male citizen of the United States, and of every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and sixty-five, to present himself for and submit to registration at such time or times and place or places, and in such manner and in such age group or groups, as shall be determined by rules and regulations prescribed hereunder.
>
> * * * * * *
>
> SEC. 3. (a) Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of twenty and forty-five at the time fixed for his registration, or who attains the age of twenty after having been required to register pursuant to section 2 of this Act, shall be liable for training and service in the land or naval forces of the United States: *Provided*, That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States * * *.
>
> * * * * * *

SEC. 11. Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any

case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act. Precedence shall be given by courts to the trial of cases arising under this Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 29

ARGYLE R. MACKEY, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, AND WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, APPELLANTS

v.

FRANCISCO MENDOZA-MARTINEZ

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

BRIEF FOR THE APPELLANTS

OPINION BELOW

The memorandum opinion of the District Court holding Section 401(j) of the Nationality Act of 1940, as amended, unconstitutional (R. 5–13), is not reported.

JURISDICTION

The judgment of the District Court was entered on October 20, 1958 (R. 16). Notice of appeal to this Court was filed in the District Court on November 17, 1958 (R. 17), and probable jurisdiction was noted on March 9, 1959 (R. 19). The jurisdiction of this Court

to review on direct appeal the decision of a District Court holding an act of Congress unconstitutional is conferred by 28 U.S.C. 1252.

QUESTION PRESENTED

Whether Congress has the constitutional power to provide, as it did in Section 401(j) of the Nationality Act of 1940, for the expatriation of a native-born citizen who, in time of war, voluntarily remained outside the jurisdiction of the United States for the purpose of evading service in the armed forces of the United States.

STATUTE INVOLVED

The Nationality Act of 1940 (54 Stat. 1137), as amended by the Acts of January 20, 1944 (58 Stat. 4), July 1, 1944 (58 Stat. 677) and September 27, 1944 (58 Stat. 746), provided in pertinent part:

> Section 401. A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * * * *
>
> (j) Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States.[1]

STATEMENT

This is a suit by the appellee to have himself declared a citizen of the United States. On September

[1] Now incorporated into Section 349 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 267-268, 8 U.S.C. 1481.

6, 1955, the District Court for the Southern District of California, Northern Division, issued a Memorandum and Order [2] rejecting appellee's claim, brought under Section 503 of the Nationality Act of 1940, that he is a citizen of the United States for the reason that Section 401(j) of the Nationality Act of 1940, as amended, under which he had been deemed by the administrative authorities to have been denationalized, was unconstitutional.[3] In a *per curiam* opinion, rendered on November 2, 1956, the Court of Appeals for the Ninth Circuit affirmed. *Francisco Mendoza-Martinez* v. *Argyle R. Mackey,* 238 F. 2d 239. On December 12, 1956, a petition for a writ of certiorari was filed (No. 623, O.T. 1956) and on April 7, 1958, this Court (356 U.S. 258) granted the petition (No. 54, O.T. 1957), vacated the judgment of the Ninth Circuit, and remanded the cause to the District Court for reconsideration in light of this Court's decision in *Trop* v. *Dulles,* 356 U.S. 86.

Upon reconsideration in the District Court, the parties stipulated the facts as follows: That appellee was born in the United States on March 3, 1922, and was a citizen of the United States by birth; that he was also, and had been ever since birth, a citizen and national of Mexico; that during 1942 appellee departed the United States and went to Mexico for the sole purpose of evading and avoiding training and service in the Armed Forces of the United States;

[2] Findings of fact and conclusions of law were filed on September 22, 1955.

[3] Appellee raised no other defense.

that he remained in Mexico continuously from 1942 until on or about November 1, 1946, for that single purpose; that on June 23, 1947, upon his plea of guilty in the United States District Court for the Southern District of California, appellee was convicted of violating Section 11 of the Selective Service and Training Act of 1940, and was sentenced to imprisonment for a period of one year and a day; that on February 3, 1953, appellee was served with a warrant of arrest in deportation proceedings; that a hearing was held on May 25, 1953, before a Special Inquiry Officer who, on September 11, 1953, ordered appellee deported from the United States as an alien; and that on October 23, 1953, the Board of Immigration Appeals dismissed appellee's appeal (R. 2–3).

On this record, the only issue is the validity of Section 401(j), under which the appellants claim that appellee has lost his United States nationality (see R. 4). Upon review of this Court's decisions in *Trop* v. *Dulles,* 356 U.S. 86, and in *Perez* v. *Brownell,* 356 U.S. 44, the District Court held Section 401(j) unconstitutional (R. 5–13) and granted appellee the relief sought under Section 503 (R. 16). The District Court found Section 401(j) indistinguishable on the question of constitutionality from Section 401(g), involved in *Trop,* providing for loss of nationality on conviction for desertion from the armed forces (R. 12).

SUMMARY OF ARGUMENT

This case presents the naked issue of the validity of Section 401(j) of the Nationality Act of 1940, decreeing denationalization for departing from or re-

maining outside the country to evade military service in time of war or national emergency. Appellee admits that he went to Mexico (of which he is also a national), and remained there until after the end of fighting in World War II, for that sole purpose.

I

In a series of decisions this Court has established that Congress may, in appropriate circumstances, provide expatriation as the consequence of designated acts voluntarily performed by an American citizen, regardless of whether he subjectively intends to give up or repudiate his United States citizenship or is aware that he will lose American nationality by performing the act. *Mackenzie* v. *Hare,* 239 U.S. 299; *Savorgnan* v. *United States,* 338 U.S. 491; *Perez* v. *Brownell,* 356 U.S. 44. This principle was not departed from in *Trop* v. *Dulles,* 356 U.S. 86, which invalidated Section 401(g) of the 1940 Nationality Act (loss of nationality upon conviction for desertion). The majority of the Court made it clear that the *Perez* rule remained unimpaired, and that *Trop* was decided on considerations pertinent to that particular subsection.

II

Under the general *Perez* principle, Section 401(j) is sustainable as a necessary and proper means of effectuating the foreign affairs power, the war power, and the inherent power of this country to retain its sovereignty and jurisdiction over its citizens.

A. The statute has a long history. A provision in effect from 1865 to 1940 prescribed forfeiture of

"rights of citizenship" for those who left the district of registration or the country to evade the draft. It was legislatively and administratively treated as a full expatriation statute. Section 401(j) was added to the Nationality Act in 1944 because draft evasion in World War II revealed the same need as had existed in the earlier times of emergency.

B. Since Section 401(j) applies *only* to those draft evaders who leave the country, it has a direct relationship to foreign affairs and represents a reasonable exercise by Congress of the foreign affairs power. American history teaches the international difficulties which can arise from efforts of one country to compel or induce its citizens in another country to return to perform military service. The same type of problems could develop if the United States were to seek the fugitive draft-evader's return from the country to which he has fled. The difficulties would be multiplied if the evader were also a national of the country in which he sought refuge—as in the present case, and most others under Section 401(j). On the other hand, by expatriating those who depart with draft-evasion as their purpose, Congress has eliminated at the outset any further claim this country could have to their services, and by the same token has reduced the danger and area of potential conflict with the nations to which they have gone.

C. Section 401(j) is also sustained by its close and direct relationship to the war power and the national defense. Unlike desertion, which carries the sanction of court-martial and imprisonment, no similar pri-

mary check exists to deter individuals who would otherwise flee this country to avoid fulfilling their military obligations. Draft-evaders outside the country cannot be apprehended and imprisoned for their departure or failure to return. Only if they return to this country, after they have accomplished their purpose and avoided service in time of danger, would it be possible to enforce against them the criminal sanctions of the selective service laws. This would not aid in raising an army when it is needed, and Congress reasonably felt that, for the difficult task of raising an army in wartime, it needed the immediate deterrent represented by loss of nationality for evasion by flight.

D. Congress also has the right to decide that it will sever the allegiance of men who reject all authority, sovereignty, and jurisdiction of this country over them. The draft-evader who seeks a foreign refuge deliberately keeps himself beyond the reach of United States criminal sanctions designed to compel him to fulfill his high duty. He is repudiating not only his military obligation but his wider obligation as a citizen to submit to this nation's justice; he rejects all authority of the United States over him, not merely his duty to serve. Dissolution of his ties to the nation cannot be deemed arbitrary.

III

Section 401(j) does not violate the Due Process Clause or the Eighth Amendment. It does not impose any improper punishment.

A. Citizenship cannot be forfeited administratively under the statute in any final way; a *de novo* judicial trial is available under Section 503 of the Nationality Act, a right of which appellee has availed himself. In that judicial trial, the Government's burden is heavy, comparable to the burden in a criminal trial. *Gonzales* v. *Landon,* 350 U.S. 920; *Nishikawa* v. *Dulles,* 356 U.S. 129. There is no denial of due process by this careful procedure. Nor, as pointed out above (*supra,* p. 5), is there any denial of due process because appellee may not have known that he would expatriate himself by voluntarily leaving this country and remaining abroad in order to evade the draft.

B. The statute does not impose any punishment on appellee. More than the desertion provision involved in *Trop,* Section 401(j) is concerned with regulation of the future rather than with punishment for past conduct; it is directed toward the prevention of embroilments with foreign countries, and inducing and goading evaders to fulfill their military responsibilities; it also represents the ending of the status of citizenship for those who repudiate that status by rejecting all American jurisdiction and authority over them. The section has been interpreted, both administratively and judicially, in non-penal fashion so as to affect only those fugitives whose draft-evasion was the dominant and primary motivation of their flight abroad.

Punishment is not involved merely because Congress imposes a non-penal disability or disqualification, following specified criminal conduct. Civil regu-

lations based on past conduct are not invalid, or transformed into punitive sanctions, where the legislators have a valid non-penal objective and do not intend to inflict punishment, even though some deterrence of criminal conduct may also ensue. Scarcely any civil consequence of statutes relating to licensing, damages, or the like, can avoid—or need avoid—incidental effects of deterrence. Cf. *Hawker* v. *New York,* 170 U.S. 189; *Helvering* v. *Mitchell,* 303 U.S. 391; *Harisiades* v. *Shaughnessy,* 342 U.S. 580; *Rex Trailer Co.* v. *United States,* 350 U.S. 148.

Even if punishment is thought to be imposed by Section 401(j), it is not an invalid or a cruel and unusual punishment. In appellee's case, statelessness is not involved, since he is a national of Mexico. Dual nationality seems also to be characteristic of the bulk of those to whom the section has been applied. And if a criminal trial is a prerequisite for punishment, that requirement is fulfilled here by appellee's prior conviction for draft evasion.

ARGUMENT

The issue in this case is whether appellee, an American citizen by birth and a Mexican national under the law of that country, has lost his American nationality by operation of Section 401(j) of the Nationality Act of 1940 (as added by the Act of September 27, 1944, 58 Stat. 746). That statute decrees loss of nationality as a consequence of leaving the jurisdiction of the United States, or remaining outside it, during time of war or national emergency, for the purpose of avoid-

ing service and training under the draft laws. *Supra*, p. 2.[4] Appellee admits by stipulation that he left the United States in 1942 solely for this purpose, and that he remained in Mexico after the effective date of Section 401(j) (September 27, 1944) until after the end of the fighting in World War II, solely for the same purpose. *Supra*, pp. 3–4. He brings suit for a declaratory judgment that he remains a citizen, alleging only that the statute was beyond the constitutional powers of Congress to enact, either generally or as applied to himself.

This case was before the Court in 1958, at which time it was remanded for consideration in the light of the Court's decision in *Trop* v. *Dulles*, 356 U.S. 86. See 356 U.S. 258. Other cases involving the same statutory provision have been before the Court, but no decision has been rendered upon the constitutionality of the section. In *Gonzales* v. *Landon*, 350 U.S. 920, the Court reversed on grounds relating to the standard of proof. In *Perez* v. *Brownell*, 356 U.S. 44, an alternate basis of decision, resting on the companion provision of the statute relating to voting in a

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[4] The statute is now 8 U.S.C. 1481(a)(10). It was amended on June 27, 1952, ch. 477, title III, ch. 3, § 349, 66 Stat. 267, to include a presumption "that the departure from or absence from the United States was for the purpose of evading or avoiding training and service" in the armed forces, whenever it was shown that there was a "failure to comply with any provision of any compulsory service laws of the United States * * *." This presumption has been deemed by the Immigration and Naturalization Service not to be retroactive (Matter of F— M—, 6 I. & N. Dec. 379), and in any event does not affect the case at bar because the facts were stipulated in the District Court below.

foreign election, was used. The validity of Section 401(j)—an "important question"—was clearly left open.[5]

It is our contention that the statute was within the power of Congress to enact, as delineated by the decisions of this Court, in that it is a necessary and proper means of effectuating the express powers of Congress to wage war, to raise armies, and to provide for the common defense; the implied power to enact legislation for the effective regulation of foreign affairs; and the inherent powers of sovereignty. The statute satisfies the requirements of due process because a judicial determination is provided, with a heavy burden of proof cast upon the government. Finally, the statute does not apply a penal sanction; it is not punitive or vindictive in conception or application. It was enacted prospectively, with a view to regulating future conduct, rather than being merely an attempt to impose additional punishment on one already chastised. If viewed as a penal sanction, however, it does not impose an invalid or a cruel or unusual punishment on appellee, particularly since he was a dual national and is therefore not rendered stateless by the statute.

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[5] "Because of our view concerning the power of Congress with respect to § 401(e) of the Nationality Act of 1940, we find it unnecessary to consider—indeed, it would be improper for us to adjudicate—the constitutionality of § 401(j), and we expressly decline to rule on that important question at this time." [356 U.S. at 62.]

See also the Memorandum of Mr. Justice Whittaker in *Perez*. 356 U.S. at 85. Mr. Justice Brennan's opinion in *Trop* likewise indicates that he was not passing on the validity of Section 401(j). 356 U.S. at 110, esp. fn. 7.

I

THIS COURT HAS ESTABLISHED THAT CONGRESS MAY, IN APPROPRIATE CIRCUMSTANCES, DECREE EXPATRIATION TO BE A CONSEQUENCE OF SPECIFIED ACTS, IRRESPECTIVE OF THE SUBJECTIVE INTENT OF THE INDIVIDUAL, OR OF HIS AWARENESS THAT HE WILL LOSE HIS NATIONALITY BY VOLUNTARILY PERFORMING THE ACT

The general power of Congress to enact expatriation statutes, incidental to the exercise of its express powers, or in proper cases as an inherent attribute of sovereignty, has now been established by the decisions of this Court. In *Mackenzie* v. *Hare*, 239 U.S. 299, decided in 1915, the Court upheld the validity of a statute making marriage to a foreigner operative to suspend the American citizenship of the wife during coverture. It was contended that the statute must fall in the absence of an express gift of power in the Constitution. The Court answered (239 U.S. at 311):

> * * * But there may be powers implied, necessary or incidental to the expressed powers. As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers. * * *

To the objection that this was to allow Congress the power to deem any act a renunciation of citizenship, the Court said (239 U.S. at 312):

> * * * The marriage of an American woman with a foreigner has consequences of like kind, may involve national complications of like kind,

> as her physical expatriation may involve. Therefore, as long as the relationship lasts it is made tantamount to expatriation. This is no arbitrary exercise of government. It is one which, regarding the international aspects, judicial opinion has taken for granted would not only be valid but demanded. It is the conception of the legislation under review that such an act may bring the Government into embarrassments and, it may be, into controversies. It is as voluntary and distinctive as expatriation and its consequence must be considered as elected.

More recently, in 1950, the Court held, in *Savorgnan* v. *United States,* 338 U.S. 491, that a statute which divested American nationality upon naturalization in another country, or upon an oath of allegiance to a foreign sovereign, followed by residence abroad in that country, took effect regardless of any subjective intent to retain American nationality, or lack of knowledge of the expatriative effect imposed by the statute on such acts. 338 U.S. at 499–500, 502.

Finally, in 1958, *Perez* v. *Brownell,* 356 U.S. 44, held that Congress was within the scope of its authorized powers in determining that one who voted in a foreign election thereby lost his American nationality. The Court stated that, for expatriation legislation, the underlying principle was whether a rational nexus existed between the content of a specific power in Congress and the action of the Congress in carrying that power into execution by withdrawing citizenship. It held that the withdrawal of citizenship could be reasonably related to the regulation of foreign affairs

(356 U.S. at 58, 60–61), and that loss of nationality for voting abroad was so related (356 U.S. at 60–61, 62). The Court dismissed the argument that the person must actually have intended to give up his citizenship: "But it would be a mockery of this Court's decisions to suggest that a person, in order to lose his citizenship, must intend or desire to do so." 356 U.S. at 61. Referring to the *Mackenzie* and *Savorgnan* cases, the Court went on to state (365 U.S. at 61–62):

> * * * Those two cases mean nothing—indeed, they are deceptive—if their essential significance is not rejection of the notion that the power of Congress to terminate citizenship depends upon the citizen's assent. It is a distortion of those cases to explain them away on a theory that a citizen's assent to denationalization may be inferred from his having engaged in conduct that amounts to an "abandonment of citizenship" or a "transfer of allegiance." * * *

In *Trop* v. *Dulles*, 356 U.S. 86, decided the same day as *Perez* v. *Brownell*, four members of the Court (speaking through the Chief Justice) held that to deprive an American citizen of his nationality for desertion whenever he had been convicted by court-martial and not subsequently reinstated by the military authorities—under Section 401(g) of the Nationality Act of 1940—was a cruel and unusual punishment in contravention of the Eighth Amendment. Mr. Justice Brennan's concurring opinion found no sufficient rational nexus between the war power or the foreign affairs power and the attempt by Congress to denationalize for desertion. He thought Section 401(g) too indirectly and remotely connected with

the war powers to sustain its validity, and noted that the provision was indiscriminately applicable whether desertion occurred in this country or abroad, that it was essentially penal in nature and as such generally ineffectual, and that it was less effective than alternative sanctions not open to constitutional objection. 356 U.S. at 105–114. But it was made quite clear that the majority of the Court did not withdraw from the conclusion in *Perez* that citizenship may, in proper circumstances, be divested in the exercise of a governmental power. See the opinion of the Chief Justice in *Trop,* 356 U.S. at 93; Mr. Justice Whittaker's memorandum in *Perez,* 356 U.S. at 84; and Mr. Justice Brennan's concurring opinion in *Trop,* 356 U.S. at 105.[6]

The ultimate conclusions to be drawn from the holdings of *Perez* and *Trop* with respect to the power of Congress to decree loss of nationality are, we believe, these:

(1) Congress may decree loss of nationality as an incident to its control over foreign affairs on a ground which is reasonably necessary to the regulation of foreign affairs.

(2) Congress may decree loss of nationality under the war powers where the necessity for that sanction in the exercise of those powers is clear and direct.

[6] Since this principle has now been established by the Court, we do not repeat the detailed arguments made in our briefs in *Perez*, *Trop*, *Savorgnan*, and other cases, in support of such Congressional power. See the Brief for the Respondent in *Perez*, No. 44, Oct. Term 1957 (No. 572, Oct. Term 1956), at pp. 10, *et seq*; and the Supplemental Brief for the Respondents on Reargument in the *Perez*, *Nishikawa*, and *Trop* case, Nos. 44, 19, and 70, Oct. Term 1957, at pp. 2, *et seq.*

The remainder of this brief will be devoted to our effort to show that Section 401(j) can be sustained under both of these principles, as well as under the inherent powers of sovereignty.

II

SECTION 401(j) OF THE NATIONALITY ACT OF 1940 IS WITHIN CONGRESSIONAL AUTHORITY AS A NECESSARY AND PROPER MEANS OF EFFECTUATING THE FOREIGN AFFAIRS POWER AND THE WAR POWER, AS WELL AS VINDICATING THE INHERENT EXERCISE OF SOVEREIGNTY

Deeply rooted in our history, Section 401(j) of the Nationality Act of 1940 is closely entwined with foreign affairs considerations and the demands of our national defense, as well as with the country's inherent rights of sovereignty.

A. THE HISTORY OF THE STATUTE

1. Section 401(j) stems initially from Section 21 of the Act of March 3, 1865, 13 Stat. 490, providing for forfeiture of the rights of citizenship of enrolled draftees who departed from their districts or from the United States with intent to avoid military service (as well as deserters from the armed forces)—with mitigating provisions for those who returned before a certain date.[1] In 1912, this 1865 statute was amended

[1] "* * * [A]ll persons who have deserted the military or naval services of the United States, who shall not return to said service, or report themselves to a provost-marshal within sixty days after the proclamation hereinafter mentioned, *shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship and their rights to become citizens;* and such deserters shall be forever incapable of hold-

to make it inapplicable in time of peace (Act of August 22, 1912, 37 Stat. 356), and it remained in effect until repealed by Section 504 of the Nationality Act of 1940 (54 Stat. 1172).[8] In our view, the 1865 Act, as originally enacted and as amended in 1912, was a true expatriation statute—withdrawing citizenship and nationality—although it referred to the "rights" of citizenship. See the discussion in the Appendix, *infra*, pp. 44–50.

2. Since the 1865 Act was repealed by the 1940 Nationality Act, after that time there was not on the books any legislation dealing with expatriation for evading the draft by leaving the country. Section 401(j) was added to the 1940 Act in 1944, at the suggestion of Attorney General Biddle, in order to meet a need that arose after the institution of the draft in World War II. H. Rep. No. 1229, 78th Cong., 2d sess., which accompanied the bill which became Section 401(j), spells out the circumstances, at pp. 1–2:

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ing any office of trust or profit under the United States, or of exercising any rights of citizens thereof; and all persons who shall hereafter desert the military or naval service, *and all persons who, being duly enrolled, shall depart the jurisdiction of the district in which he is enrolled, or go beyond the limits of the United States, with intent to avoid any draft into the military or naval service, duly ordered, shall be liable to the penalties of this section.* * * *." (Emphasis added.)

[8] Section 401(g) of the 1940 Act—invalidated in *Trop*—provided for loss of nationality by those deserting the armed forces in time of war (54 Stat. 1169). This provision is apparently the reason for the total repeal of the 1865 Act which dealt both with deserters *and* with draft evaders. Provision with respect to draft evaders was resumed in 1944, see the text *infra*.

> It is, of course, not known how many citizens or aliens have left the United States for the purpose of evading military service. The Department of Justice discovered that in the western district of Texas, in the vicinity of El Paso alone, there were over 800 draft delinquents recorded in the local Federal Bureau of Investigation office, born in this country and, therefore citizens, who had crossed the border into Mexico for the purpose of evading the draft, but with the expectation of returning to the United States to resume residence after the war.

And Attorney General Biddle's letter to the Congress stated (H. Rep. No. 1229, at pp. 2–3):

> Persons who are unwilling to perform their duty to their country and abandon it during its time of need are much less worthy of citizenship than are persons who become expatriated on any of the existing grounds.[*]

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[*] The Attorney General's letter also said, in part:

"* * * * * *

The files of this Department disclose that at the present time there are many citizens of the United States who have left this country for the purpose of escaping service in the armed forces. While such persons are liable to prosecution for violation of the Selective Service and Training Act of 1940, if and when they return to this country, it would seem proper that in addition they should lose their United States citizenship. * * *

* * * Any person who may be deemed to have become expatriated by operation of the foregoing provision, would be entitled to have his status determined by the courts pursuant to the above-mentioned section of the Nationality Act of 1940.

Adequate precedent exists for the suggested legislation in that during the First World War a statute was in force which provided for the expatriation of any person who went beyond

The bill was passed unanimously by the House (90 Cong. Rec. 3256), favorably and unanimously reported by the Senate Committee (S. Rep. No. 1075, 78th Cong., 2d sess.) and then passed unanimously by the Senate (90 Cong. Rec. 7628–7629). The House accepted a technical Senate amendment (90 Cong. Rec. 7725–7726), and the bill became law on September 27, 1944.[10]

B. THE FOREIGN AFFAIRS POWER

Unlike Section 401(g), involved in *Trop,* Section 401(j) affects *only* draft-evaders who remove themselves from the United States. It is limited to those "who flee to another land" (see Mr. Justice Brennan, commenting on Section 401(g) in *Trop,* 356 U.S. at 107), and does not apply to draft-evaders who remain within this country. As a result, like Section 401(e) (the foreign-voting provision sustained in *Perez*), subsection (j) has a direct relationship to foreign affairs.

1. A draft-evader who leaves or remains outside this country to avoid military service can easily cause international complications. In the eyes of the foreign power, he would still be an American citizen for whom the United States would be deemed responsible

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the limits of the United States with intent to avoid any draft into the military or naval service (37 Stat. 356). * * *."

[10] H. Rep. No. 1229, *supra*, p. 2, makes it clear that—unlike the 1865 Act—no court conviction would be necessary for expatriation under Section 401(j). First, there would be an administrative decision and, then, the individual would have access to the courts under the declaratory judgment procedure or, if necessary, by way of habeas corpus. See the discussion in Point III, *infra*, *pp.* 30–32.

(at least to some degree) even though it had no control over him, and on whom the United States could still impose demands even though he had fled this country. At the same time, the foreign country would have a substantial measure of interest in the fugitive now that he was resident on its soil, and might feel called upon to grant him various rights of protection.

In appealing to Mendoza-Martinez and those like him to return to face their military obligations, or forfeit their nationality, Congress was seeking to avoid the international problems which could arise if this country attempted to effect the return of draft-evaders by requests to the foreign sovereign which that nation might be unwilling to grant. In times of war or national emergency, when the need for manpower for the armed forces is great, the United States could well feel called upon to make representations to, or bring pressure upon, certain nations to make sure that they do not become refuges or centers for American draft-evaders.[11] Extradition

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[11] As already pointed out, in H. Rep. No. 1229, 78th Cong., 2d Sess., pp. 1–2, which accompanied the bill that became Section 401(j), the conditions existing in 1944 were pointed out as follows:

"It is, of course, not known how many citizens or aliens have left the United States for the purpose of evading military service. The Department of Justice discovered that in the western district of Texas, in the vicinity of El Paso alone, there were over 800 draft delinquents recorded in the local Federal Bureau of Investigation office, born in this country and, therefore citizens, who had crossed the border into Mexico for the purpose of evading the draft, but with the expectation of returning to the United States to resume residence after the war."

treaties do not normally cover draft-evasion, and foreign countries do not feel obligated to expel men charged with such "political-type" offenses. A true embroilment could result. And even if the United States contented itself with communications with the evader himself, he might seek the protection or intercession of his country of flight in the effort to avoid serving in our forces. Particularly if the fugitive leaves this country through disaffection or lack of sympathy for the war or defense program—a not unlikely possibility—will there be both opportunity and motivation for entangling the United States with the other nation.

The problems are multiplied if the draft-evader is a dual-national. If he is a citizen of the country in which he seeks refuge—as is appellee [12]—his actions, and our demands, could place the other nation in the difficult position of seeking a course of action which would protect its own nationals, while continuing friendly relations with another country which might be a strong ally. In *Gonzales* v. *Landon*, 350 U.S. 920, the first case in this Court involving Section 401(j), the dual national claimed, while living in Mexico (his other country), that he was exempt from American military service under an executive agreement between this country and Mexico, thus apparently

[12] Appellee is also a national of Mexico (see the Statement, *supra*, p. 3). While the District Court pointed out that his conduct during his stay in Mexico was no different from that of other law-abiding Americans there on visas or passports (R. 10), this does not change the potential danger to foreign relations posed by the dual-national status of a draft-evader.

seeking to play one of his countries off against the other. Extradition of such a dual national would often be impossible even if the treaty could be read to cover the offense. Mexico, for instance, need not deliver up any Mexican national, according to the express terms of the extradition agreement between our two countries.[13] And if the evader were a dual national, not of the "host" country, but of a third nation which asserted an objection to his return, there would likewise be international difficulties.

2. The potentiality of foreign embroilment through fugitive draft-evaders is not fanciful. American history is marked by international difficulties flowing from attempts to compel or prevent military service by young men. In the 19th century, there was a long involvement with other countries over the asserted continued liability of our naturalized citizens to military obligations imposed by their countries of birth. See III Moore, *Digest of International Law,* Secs. 434–440; Tsiang, *The Question of Expatriation in America Prior to 1907* (1942), *passim; Perez* v. *Brownell,* 356 U.S. 44, 48. This was not the least of the causes of our first national war, with Great Britain in 1812. Moore, *op. cit.,* Sec. 434. Later, when this country first found it necessary to conscript for

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[13] See Article IV, Treaty of Extradition between the United States of America and the United States of Mexico, proclaimed April 24, 1899 (31 Stat. 1818 at 1822). Cf. 30 Am. J. Int. Law 480; Garcia-Mora, *International Law and Asylum as a Human Right,* p. 105 (1956); VI Hackworth, *Digest of International Law,* Sec. 578 (1943).

military service, in the Civil War, the government fell into the anomalous position of—

> resisting, on the one hand, their [foreign powers'] claims for the exemption from our military service of persons who appealed to their protection, and, on the other, the enforcing of claims for the exemption of the like class from military service in foreign countries, on the ground of their having acquired the rights of citizenship in the United States. [Letter of Sec. of State Seward to Motley, Apr. 21, 1863, Department of State, MS, "Instructions, Austria," (National Archives) I, 186; cited in Tsiang, *The Question of Expatriation in America Prior to 1907* (1942), at p. 83.]

As in World War II, some Americans went abroad for the purpose of evading our draft laws. At times, these same persons then called upon the American government for protection from conscription, if they had returned to their native land. Seward to Judd, March 7, 1863, Dept. of State, *Foreign Relations*, 1863, pt. 2, p. 940. There was not, during that period, any law forbidding flight in order to avoid service, but it appears that the reaction to these fugitives' calling upon the United States for protection against service abroad was one of the factors leading to the 1865 statute (discussed *supra*, pp. 16–17) providing for the forfeiture of the citizenship of anyone going beyond "the limits of the United States, with intent to avoid any draft into the military or naval service, duly ordered." Cf. Tsiang, *op. cit.*, pp. 83–84; Comment, *Constitutional Law—Citizenship—Power of*

Congress to Effect Involuntary Expatriation, 56 Mich. L.R. 1142, 1152.

3. By expatriating those who depart from this country with draft-evasion as their purpose, Congress has eliminated at the outset any further claim that this country would have to the services of these individuals, and consequently has reduced the danger of potential conflict with the nation to which they have gone. As Mr. Justice Brennan noted with respect to the voting provision of Section 401(e) [*Trop*, 356 U.S. at 106]:

> * * * Congress has ordained the loss of citizenship simultaneously with the act of voting because Congress might reasonably believe that in these circumstances there is no acceptable alternative to expatriation as a means of avoiding possible embarrassments to our relations with foreign nations. * * *

By the same token, Section 401(j) acts to avoid the possible areas of international dispute and conflict to which we have referred, and thus implements the regulation of foreign affairs; as such, it is a reasonable Congressional exercise of the foreign affairs power. "The termination of citizenship terminates the [international] problem." "The importance and extreme delicacy of the matters here sought to be regulated demand that Congress be permitted ample scope in selecting appropriate modes for accomplishing its purpose." *Perez*, 356 U.S. at 60.

Although the section is not confined to dual nationals, it is pertinent to note, particularly since appellee fits into that class, that all the litigated cases we know

in which individuals have finally been held to have been expatriated under Section 401(j) appear to have involved dual nationals. (That is true of the three cases on Section 401(j) in this Court: *Gonzales*, 350 U.S. 920; *Perez*; and the present case).[14] Congress was not compelled to restrict the statute narrowly and precisely to that category (see *Perez*, 356 U.S. at 59–60), but the grounding of the section in the foreign affairs power does gain added firmness from the fact that dual nationals form so large a part of the statutory class.

C. THE WAR POWER

Section 401(j) is also sustained by its close and direct connection with the war power and national defense.[15] Unlike desertion, which carries the primary sanction of court-martial and imprisonment, no similar primary check exists to deter those individuals who would otherwise flee this country to avoid fulfilling their military obligations. Draft-evaders outside the country cannot be apprehended there and imprisoned for their departure or failure to return. As indicated above (*supra*, pp. 20–21), they are not normally subject

[14] For discussion of the fact that Section 401(j) appears to have been applied mainly to dual nationals, even administratively, see *infra*, p. 42.

[15] It does not detract from the validity of an expatriation statute that it finds support in both internal and foreign affairs considerations. As was said in *Mackenzie* v. *Hare*, 239 U.S. 299, 311, concerning the statute there at issue:

> * * * It has purpose, if not necessity, in purely domestic policy; it has greater purpose and, it may be, necessity, in international policy. * * *

to extradition. Only if they return to this country, after they have accomplished their purpose and avoided service in time of danger,[16] would it be possible to enforce against them the criminal sanctions of the selective service laws. This would not aid in raising an army when it is needed. As the legislative history set forth above shows (*supra*, pp. 17–19), Congress felt that, for the difficult task of raising an army in war time, it needed the immediate deterrent represented by loss of nationality for evasion by flight abroad.[17] Congress could also properly weigh the effect of its permitting draft-evaders to remain in a foreign sanctuary upon those who readily answered the call and stood ready to give their lives, if need be, to defend the country.

That appellee was not reachable by any other means is demonstrated by his own case history, which shows that he remained abroad until the war was safely over before entering the United States, pleading guilty to draft evasion, and, after serving a year in jail, attempting to pick up the thread of his life in this country. The United States clearly could not have compelled Mexico to return him. See *supra*, p. 22. In any event, when the existence of the country itself may be at stake, it would be intolerable for the government to be forced to rely primarily on the dis-

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[16] Appellee returned to this country after November 1, 1946, *i.e.*, after the end of the fighting in World War II. *Supra*, pp. 3–4.

[17] Even after flight abroad, Section 401(j) would act as a goad to return, since it has been broadly read to the advantage of those who return (after initial flight) while the war or emergency still continues. See *infra*, pp. 39–40.

cretion of the foreign sovereign as to whether it will or will not return the draft-evader.[18]

For these reasons, Congress could properly conclude that denationalization in this type of case was a direct and necessary exercise of the war power; its judgment in this respect had warrant in the realities and was not unreasonable. This is not a situation where, in the judgment of Congress, alternative methods would be sufficient; rather, it is a case where the only meaningful instrument which would not provoke foreign embroilments is expatriation.

D. THE INHERENT RIGHTS OF SOVEREIGNTY

When the power of the national legislature to raise armies by means of a draft law was challenged in this Court in 1917, in the *Selective Draft Law Cases*, 245 U.S. 366, the Court, affirming the criminal convictions of those who refused to submit to the draft, stated (245 U.S. at 377–378):

> * * * Further it is said, the right to provide [for the common defense] is not denied by calling for volunteer enlistments, but it does not and cannot include the power to exact enforced military duty by the citizen. This however but challenges the existence of all power, *for a governmental power which has no sanction to it and which therefore can only be exercised*

[18] That the federal government has the power to order our citizens abroad to return, for any lawful purpose, cannot be doubted since the decision of this Court in *Blackmer* v. *United States*, 284 U.S. 421. Indeed, the Court has also stated, by way of dictum, that it is the duty of every citizen to return to the United States upon the outbreak of hostilities. *The William Bagaley*, 5 Wall. 377 at 408.

> *provided the citizen consents to its exertion is in no substantial sense a power.* * * * [Emphasis added.]

Unless the government can cut its ties with the fleeing evader, as through Section 401(j), it will in reality be denied all power over him, just as *he* denies the government all power over him. A government which cannot exert force to compel a citizen to perform his *lawful* duty is, to that extent, not sovereign.

Not only does the fugitive draft-evader reject the highest duty of citizenship—a call to service [19]—but he also refuses to submit to this country's jurisdiction over him. By deliberately keeping himself beyond the reach of United States criminal sanctions designed to compel him to fulfill his prime duty of service, he repudiates his wider obligation as a citizen to submit to this country's jurisdiction and authority. He rejects all authority of the United States over him, not merely his duty to serve. Such a withdrawal is so basic that all other aspects of citizenship can rightly be made to fall with it.

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[19] Readiness to serve in the country's armed forces in time of war or emergency has always been a cardinal element of United States citizenship, subject only to the most narrow exception of conscientious objection. The country's demand upon the citizen-soldier has been deemed the highest call to duty. This Court has characterized it as the "supreme and noble" duty (*Selective Draft Law Cases*, 245 U.S. 366, 390), and has recognized the primacy of military service, *when the citizen is called upon by Congress to perform it*, as *the* obligation of citizenship. Cf. *United States* v. *Schwimmer*, 279 U.S. 644; *United States* v. *Macintosh*, 283 U.S. 605; *United States* v. *Bland*, 283 U.S. 636; *In re Summers*, 325 U.S. 561, 572; *Girouard* v. *United States*, 328 U.S. 61, 64; *Falbo* v. *United States*, 320 U.S. 549; *Lichter* v. *United States*, 334 U.S. 742, 756–757.

Effective jurisdiction can properly be considered by Congress as a necessary concomitant of citizenship. The Fourteenth Amendment itself makes it a prerequisite to citizenship that the person be "subject to the jurisdiction" of the United States.[20] Regardless of the crimes with which an individual may be charged, so long as he remains within the reach of our law enforcement agencies, within the enforcible reach of the process of our courts, his act does not strike at the very foundation of his relationship with his government, and with his fellow-citizens, in so drastic a manner as does the act of one who removes himself physically from the jurisdiction of the country in order to elude the grasp of our law. If citizenship is a relationship comparable to a mutual compact (*Inglis* v. *Sailor's Snug Harbour,* 3 Pet. 99, at 124), the fundamental articles of that agreement are the submission of the citizen to the jurisdiction of lawfully constituted government, and the agreement of the government to proceed within the confines of the powers delegated to it. The withdrawal of the individual from the most basic of the elements of that agreement terminates the contract. At that point, dissolution of his ties to the nation cannot be deemed arbitrary.[21]

[20] "All persons born or naturalized in the United States, *and subject to the jurisdiction thereof,* are citizens of the United States and of the State wherein they reside." (Emphasis added.)

[21] There was undoubtedly some period of time during his absence from the country that appellee could have saved his American nationality by returning to the country. Section 401(j) has been liberally construed in favor of the individual in cases of return before the end of the war or the emergency. See *infra*, p. 40.

We submit, in short, that there is a limit to the refusal to perform the obligations of citizenship, beyond which further refusal may justify the divestiture of that citizenship by Congress. That limit has been reached by petitioner in the conjunction of the two elements here present: draft evasion plus deliberate absence from the jurisdiction of the United States for the furtherance of that purpose. As was said in a different context in *Kawakita* v. *United States*, 343 U.S. 717 at 735–736:

> If he can retain that freedom and still remain an American citizen, there is not even a minimum of allegiance which he owes to the United States while he resides in the enemy country. That conclusion is hostile to the concept of citizenship as we know it, and it must be rejected. One who wants that freedom can get it by renouncing his American citizenship. He cannot turn it into a fair-weather citizenship, retaining it for possible contingent benefits but meanwhile playing the part of the traitor. An American citizen owes allegiance to the United States wherever he may reside.

III

SECTION 401(j) DOES NOT VIOLATE THE DUE PROCESS CLAUSE OR THE EIGHTH AMENDMENT

A. THERE IS NO VIOLATION OF DUE PROCESS

1. It has been suggested that the statute offends due process because it is applied administratively, without a hearing or judicial proceeding, and that citizenship cannot be divested in that fashion. But the fact is that the statute attaches the consequence

of expatriation to certain acts, and does not itself prescribe any procedure for determining whether or not those acts have occurred. True, the initial determination whether Section 401(j) has been brought into operation by a particular individual will often be made by the executive branch, when it seeks to deport him as an alien illegally in the country, or to exclude him from entering the country (if he is outside), or to deny him a passport or some other right available to citizens.[22] This happens because the officials, like the courts, are required to enforce the statute and must apply it to the particular cases coming before them.

The administrative ruling, however, is not the end of the story or even the main chapter. The individual—like appellee—is entitled to bring a declaratory judgment action to establish his citizenship. See Section 503 of the Nationality Act of 1940, 54 Stat. 1137, 1171; Section 360 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 273; *Perez* v. *Brownell*, 356 U.S. 44, 47, fn. 2; *Trop* v. *Dulles*, 356 U.S. 86, 123, fn. 3 (dissenting opinion). The trial is *de novo*, and once the plaintiff establishes the fact of his having been a citizen, the burden is on the United States to prove that he has lost that citizenship by "clear,

[22] Appendix B to the Government's Brief in the *Perez* case (No. 572, Oct. Term 1956, No. 44, Oct. Term 1957), at pp. 62–63, points out that the Commissioner of Immigration and Naturalization reported that a total of 883 persons had been administratively deemed expatriated under Section 401(j) for the eight-year period from July 1, 1948, to June 30, 1956. In the next two years, 106 were deemed expatriated. The figures for the year ending June 30, 1959, are not yet available.

unequivocal, and convincing" evidence which does not leave that issue in doubt. *Gonzales* v. *Landon*, 350 U.S. 920; *Nishikawa* v. *Dulles*, 356 U.S. 129. This standard of proof is comparable to that applied in a criminal case, and the plaintiff's rights are fully protected. If the United States were required to bring suit to divest appellee of his citizenship while he remained abroad, the spectacle of a trial *in absentia* would develop. As we have suggested (*supra*, pp. 20–21, 25–26, 28–29), it is the very fact of appellee's being beyond the reach of our normal legal process that is the basis for this statute.

2. Nor can appellee claim that he lacked notice that his act contravened the laws of this country, and that the ultimate sanction should not be applied for that reason. By stipulation, he has conceded knowledge of his obligations under the selective service laws, and that he deliberately flouted those laws, eventually leaving the jurisdiction of the United States, and remaining abroad until after the war, for that very purpose alone. See *supra*, pp. 3–4. Due process requires that a man be given notice of his obligations which is reasonable and available under the circumstances. *Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314–315; *Blackmer* v. *United States*, 284 U.S. 421, 439, 443. Here, appellee, with deliberateness, put himself out of contact with the authorities, giving no notice that he was leaving and leaving no forwarding address. On the part of the government, the laws concerning selective service and expatriation were duly promulgated in the usual fashion. In addition,

an executive Proclamation had been issued on October 28, 1943 (No. 2597, 8 F.R. 14595), ordering United States citizens abroad to comply with the selective service laws by registering with the American consul.

It may be conceded that appellee did not know the expatriative effect of his remaining abroad, and did not wish to expatriate himself. But he knew that to avoid military service was a violation of our laws, and he went and remained abroad "for the sole purpose of evading and avoiding" military service (R. 3). It is now settled that voluntary performance of an expatriating act is not excused by lack of knowledge that expatriation will result. *Mackenzie* v. *Hare,* 239 U.S. 299; *Savorgnan* v. *United States,* 338 U.S. 491; *Perez* v. *Brownell,* 356 U.S. 44, 61–62 (all discussed *supra,* pp. 12–15).

B. THE STATUTE DOES NOT IMPOSE PUNISHMENT, NOR DOES IT VIOLATE THE EIGHTH AMENDMENT

1. *Punishment*

(*a*). In *Trop,* five of the Justices held that Section 401(g), the desertion provision there involved, imposed punishment, and must be treated as such. We submit that Section 401(j), in contrast, should not be so viewed, even under the criteria stated by the prevailing opinions in *Trop.* The statute there found constitutionally defective operated only after the deserter had been caught and punished; indeed, he could be punished by death or life imprisonment. Loss of nationality occurred only after the judgment of a

court-martial had been entered, and only if subsequently the military authorities declined to reinstate the deserter. Moreover, expatriation of the deserter, after the event, could not avoid the harm of desertion except by acting as a deterrent. See Mr. Justice Brennan in *Trop*, 356 U.S. at 109–110. And that deterrent effect would probably be tenuous in the case of a capital offense like desertion. Likewise, there would be little or no effect on foreign affairs.

On the other hand, Section 401(j) looks to the future, to a far greater extent. Among its purposes are (a) the prevention of future embroilments with foreign nations (*supra*, pp. 19–25), and (b) the effort to persuade the evading fugitive to return to perform his service (*supra*, pp. 25–27). The mere criminal act, draft evasion, is not what invokes the denationalization; instead, it is an act having no inherent criminal taint, *i.e.*, leaving or remaining outside the country. The power of the sovereign is being used to persuade or induce the citizen to return to American jurisdiction for a legitimate purpose. This is a regulatory, not a punitive, purpose. Similarly, it is not punitive to sever the allegiance of those, like appellee, who have rejected all authority of the United States over them, by placing themselves wholly beyond its jurisdiction and power (*supra*, pp. 27–30). Such severance of allegiance is simply the recognition of a basic repudiation of citizenship which has already taken place.

(*b*). In addition, the legislative history of Section 401(j) shows that punishment of draft-evaders was not the exclusive, or the dominant, concern of the

Congress which enacted it in 1944.[23] The letter of Attorney General Biddle (see *supra*, pp. 17–19) treated the contemplated provision for what it was—a designation of loss-of-nationality rather than a penal measure. He carefully distinguished between "prosecution" for violation of the selective service laws and expatriation; "in addition" to criminal punishment, he said, it would be proper for fugitive evaders to lose their United States citizenship; he referred to them as not "worthy" of citizenship, just as doctors or lawyers who shirk their responsibilities may be determined not to be fit to retain their status and license. The stress, moreover, was on the draft-evaders' flight from the country, rather than on the draft-evasion by itself. It was the character of the expatriating act as a whole in relation to the status of citizenship that was the concern of the legislation, rather than punishment directed against those who commit or perform the act. There were, of course, references in debate to "penalties" or "punishment", but in appraising the action of Congress for constitutional purposes, the looseness of common parlance should not be allowed to outweigh the essential purpose and true nature of what was done.

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[23] On the face of the Nationality Act of 1940, the Congress made a distinction between penal provisions and its designation in Section 401 of certain acts as involving loss of nationality. The chapter entitled "LOSS OF NATIONALITY" followed, and separated by only a single paragraph, from a whole section entitled "PENAL PROVISIONS" (54 Stat. 1163). See *Helvering* v. *Mitchell*, 303 U.S. 391, 404, with respect to the significance of the physical separation of non-penal provisions of a statute from the penal sanctions.

Needless to say, punishment is not involved merely because a consequence ensues which is financially, emotionally, or otherwise objectionable or harmful to the person affected, and which may incidentally add to the deterrent effect of the prison terms or fines which may be imposed as true criminal penalties for the same conduct. See *Trop*, 356 U.S. at 124–5 (dissenting opinion).[24] The law knows many such disabilities or non-penal sanctions. See *e.g.*, *Helvering* v. *Mitchell*, 303 U.S. 391, 399–401; *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 554–555; *Rex Trailer Co.* v. *United States*, 350 U.S. 148.[25] See also, *e.g.*, 18 U.S.C. 202, 205, 206, 207, 216, 218, 281, 282, 290, 593, 1905, 1907, 1908, 1912, 1913, 2381, 2383, 2385, 2387. "The penal and remedial provisions are, therefore, distinct and cannot be confounded" (*O'Sullivan* v. *Felix*, 233 U.S. 318, 324). Civil regulations based on past conduct, even though the regulation is harmful to the individual, are not invalid, or transformed into punitive sanctions, where they represent a *bona fide* exercise of regulatory power to accomplish a non-penal purpose, and are not designed to inflict

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[24] With respect to expatriation, Congress has always been aware that some of its enactments in this area may lead to severe or harsh results, and has therefore provided for various types of mitigation and amelioration. See the Supplemental Brief for the Respondents on Reargument in *Perez*, *Nishikawa*, and *Trop* (Nos. 44, 19, and 70, Oct. Term 1957), at pp. 7–11.

[25] These three cases involve, or refer to, the following non-penal sanctions: (a) disbarment; (b) deportation of aliens; (c) denial or revocation of a license to practice a profession, trade, etc.; (d) forfeiture of goods; (e) additional tax, customs, etc., penalties and "additions" to taxes or duties; and (f) statutory sums for liquidated damages for fraud.

punishment. Disbarment is a prime example. Cf. *Sacher* v. *Association of the Bar,* 347 U.S. 388. Another instance is furnished by *Hawker* v. *New York,* 170 U.S. 189, which upheld a state law preventing a doctor from practicing medicine, because of a criminal conviction occurring years before the statute was passed. See, also, *Barsky* v. *Board of Regents,* 347 U.S. 442. *Garner* v. *Board of Public Works of Los Angeles,* 341 U.S. 716, made the same general ruling as to the refusal of public employment for prior subversive activity. Cf. *Adler* v. *Board of Education,* 342 U.S. 485; *United Public Workers* v. *Mitchell,* 330 U.S. 75; *American Communications Assn.* v. *Douds,* 339 U.S. 382. In short, there are many instances in which non-penal disabilities, disqualifications, or sanctions follow upon conduct which may also, in whole or in part, be criminal.[26]

This Court's decisions with respect to aliens involve, of course, considerations not applicable to citizens, but the holdings that deportation is not punishment (e.g., *Mahler* v. *Eby,* 264 U.S. 32, 39; *Harisiades* v. *Shaughnessy,* 342 U.S. 580, 594–595; *Galvan* v. *Press,* 347 U.S. 522, 531; *Marcello* v. *Bonds,* 349 U.S. 302, 314) well illustrate the principle that severe consequences of, or disabilities imposed on, specified conduct do not *per se* constitute punishment. In the case of aliens, the sanction of deportation is imposed because Congress is "seeking to rid the country of persons who

[26] See, generally, Note, *Punishment: Its Meaning In Relation To Separation of Power and Substantive Constitutional Restrictions and Its Use In The Lovett, Trop, Perez, and Speiser Cases,* 34 Ind. L.J. 231, 239–241, 249–251, 261–263, 270–271, 272–296.

had shown by their career that their continued presence here would not make for the safety or welfare of security" (*Mahler* v. *Eby, supra,* 264 U.S. at 39). Similarly, denaturalization is not punishment. See *Klapprott* v. *United States,* 335 U.S. 601, 612.

In the present case, the disability of loss-of-nationality is imposed because Congress has determined that persons like appellee can no longer accurately be called American citizens. In these classes of cases—deportation, denaturalization, and denationalization—the determination may result in serious hardship. But the deportation and denaturalization cases show that severity of the resulting consequences is not indicative of punishment where those consequences have a relationship to a purpose independent of punishment, as is the case here in the aim to delineate those who shall no longer be treated as citizens of the United States. See, also, *Rex Trailer Company* v. *United States,* 350 U.S. 148, 150–151 (in which fixed amounts of $2,000 on every count of a fraud recovery proceeding by the Government were held to be liquidated damages and not fines); *United States ex rel. Marcus* v. *Hess,* 317 U.S. 537, 549; and the cases cited *supra,* at pp. 36–37.

(*c*). A further indication that this statute is not punitive is the fact that the mental state required is different in kind from that usually found in a criminal statute. Section 401(j) makes expatriation depend on leaving or remaining outside of the United States "for the purpose" of evading or avoiding military service. This goes beyond a mere intent, commonly inferred from one's acts, that one intended

to do what one did. The Immigration and Naturalization Service and the Board of Immigration Appeals have required a showing that the dominant or primary motive in leaving or remaining away has been to avoid military service. Where the evidence might fairly give rise to an inference that the primary motive was not to evade the draft, but, *e.g.*, to support one's family, or conduct one's business abroad, it has been found that citizenship was not forfeited, regardless of possible criminal penalties for draft evasion. See Matter of J—, Int. Dec. # 979; Matter of G—M—, 2 I. & N. Dec. 861; Matter of M—, 2 I. & N. Dec. 910; Matter of G—, file # A-6544269 (B.I.A. 1947) (unreported decision; mere violation of selective service regulations was not sufficient to sustain finding of expatriation). The government's burden of proof has been recognized to be heavy. The case of J—, Int. Dec. # 979, *supra*, is illustrative. He left the United States for Mexico in early 1951 and failed to report for induction in May 1951 as ordered. After negotiating for draft deferments and related relief for six years, he agreed to return to the United States in 1957, provided an indictment for draft evasion would be suspended, pending an application to his draft board to be accepted for service. This was done, but the board rejected his application, apparently because he had since turned 26 (the reasons were not of record). The indictment was then pressed to a conviction, and J—, after serving his sentence and returning to Mexico, once again sought admission to the United States. After several intermediate decisions, the Attorney General ordered his admission

as a United States citizen, apparently on the ground that J—'s testimony that he was in Mexico for the six years on legitimate business, and that he never wanted more than a short deferment, had not been successfully countered by the government's evidence, or by any logical inferences from petitioner's conduct.

Where the expatriative act relied on was remaining away after leaving the United States prior to the national emergency, there has been required a showing that the individual intended to come to the United States, and then refrained from doing so solely or primarily because he feared the military service obligation. Matter of M—, *supra;* Matter of A—S—, file #A-6450178 (B.I.A. 1955) (unreported decision; held, government failed to show a "desire" to come to the United States overcome by a reluctance to serve); Matter of S—, file #A-6661544 (B.I.A. 1947) (unreported decision); Matter of N—C—, file #A-10460191 (B.I.A. 1957) (unreported decision). Conversely, the return of the individual to this country during the war or emergency makes it very difficult to show that he departed or remained abroad for the dominant or primary motive of evading the draft. See Matter of J—, *supra.* If appellee had returned before the end of the fighting, perhaps he, too, could have saved his American nationality.[27]

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[27] The unreported decisions of the Board of Immigration Appeals reveal a large number of cases in which, despite proof that a draft-evader had left or remained outside the country, it was held that he had not lost his citizenship, for reasons such as those mentioned in the text, *supra.*

These administrative interpretations have also been assumed or adopted by the courts when they have had occasion to pass on issues under Section 401(j). See, *e.g., Gonzales* v. *Landon,* 350 U.S. 920; *Ponce* v. *McGrath,* 91 F. Supp. 23 (S.D. Cal.).[28]

2. *Cruel and Unusual or Invalid Punishment*

We have urged above (*supra,* pp. 33–41) that the expatriation provided by Section 401(j) should not be viewed as "punishment". But even if it is, we submit that it does not impose an invalid "punishment" or one contrary to the Eighth Amendment—at least as applied here.

(*a*). The general reasons why expatriation is not an improper penalty for those who flee the country to evade the draft have been outlined above (*supra,* pp. 33*ff*) at the outset of our argument why it is not a penalty at all. In particular, it is important, first, that, unlike desertion (as viewed by Mr. Justice Brennan in *Trop,* 356 U.S. at 112–113), flight to evade the draft must *always* be a very serious act, and, second, that there are no practical or useful alternatives.

(*b*). In appellee's case, it cannot be said that the result of the statute is to impose statelessness, which has been viewed by members of the Court as a cruel and unusual punishment (*Trop,* 356 U.S. at 101–103). Appellee is a Mexican national (*supra,* p. 3), and he retains that citizenship. He would not become stateless.

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[28] See, generally, Roche, *Loss of American Nationality—The Development of Statutory Expatriation.* 99 U. of Pa. L.R. 25, 64; Sharon, *Loss of Citizenship by Draft Dodgers,* 5 I. & N.S. Monthly Rev. 97, 98 (Feb. 1948).

We estimate that the majority of the cases in which Section 401(j) has thus far been applied have also involved dual nationals of Mexico and the United States. The section was enacted in 1944 primarily because of the large numbers of men who had gone to Mexico (many or most of them, apparently, dual nationals) to "sit out" the war. See the legislative history, *supra*, p. 18. We have found no lower federal court decision in which a person who was a national of the United States alone has been deemed expatriated under Section 401(j); and, though statistics are not available, we believe that very few, if any, persons have been deemed administratively expatriated under the section who were not dual nationals. See *supra*, pp. 38–41. The majority of the administrative cases appear to have involved men who were nationals of both the United States and Mexico. Should a case come here involving a man possessing only American nationality, the Court could then decide whether statelessness would suspend the operation of Section 401(j), and if so in what circumstances.[29]

(*c*). If it be thought that "punishment" cannot be imposed except after a criminal trial and conviction, that requirement is fulfilled here. Appellee has been tried and convicted of draft evasion, and he concedes that he fled and remained abroad in order to evade

[29] It has been suggested that there is an evolving principle of international law that nations have a duty in comity to receive their former nationals, in order to avoid burdening the international community with stateless persons. See 30 Am. J. Int. L. 495, and, generally, Weis, *Nationality and Statelessness in International Law* (1956).

the draft." *Supra*, pp. 3–4. Even if it is punishment, there is no requirement that the consequence of expatriation be set out in the draft evasion statute, or that it be pronounced at the time of the criminal conviction. See *Gore* v. *United States*, 357 U.S. 386, 392–393; *Trop*, 356 U.S. at 122–123 (dissenting opinion); *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 555–556 (concurring opinion).

CONCLUSION

For these reasons, it is respectfully submitted that the judgment of the court below should be reversed.

J. LEE RANKIN,
Solicitor General.
MALCOLM R. WILKEY,
Assistant Attorney General.
OSCAR H. DAVIS,
Assistant to the Solicitor General.
PAUL J. KOMIVES,
Attorney.

AUGUST 1959.

APPENDIX

The 1865 Act as an Expatriation Statute

The great weight of history, authority, and the other relevant aids to interpretation is to the effect that Section 21 of the Act of March 3, 1865, 13 Stat. 490, *supra*, pp. 16–17, was a loss-of-citizenship and loss-of-nationality statute, even though it referred only to the loss of "rights of citizenship."

1. The Act itself specifically decrees that *alien* deserters and draft-evaders shall forfeit "their rights to become citizens", thus indicating that citizenship itself (and not merely such rights as the franchise) was involved. Again, Congress took pains to prescribe that draft-evader and deserters "shall be deemed to have voluntarily relinquished and forfeited" their rights. These are words appropriate to loss of nationality and loss of citizenship as such, rather than merely to the political rights appurtenant to citizenship; in the latter case, terms of voluntary relinquishment or forfeiture are not normally used but only an outright prohibition or prescription. Moreover, the Revised Statutes included the Act under the title of "Citizenship" (Title XXV) (Rev. Stat. 1996, 1998) along with the 1868 expatriation statute (Rev. Stat. 1999), and other provisions dealing with nationality.[1]

[1] These provisions show that Congress has often used the terms "rights of citizenship" and "citizenship" interchangeably. For instance, Rev. Stat. 1993, providing for citizenship of children born abroad of fathers who were Americans at the time of the child's birth goes on to say: "but the *rights of citizenship* shall not descend to children whose fathers never re-

2. Administratively, the 1865 Act was likewise recognized as a loss-of-nationality statute. Early evidence of this historical fact is furnished by Secretary of State Hamilton Fish's answer, in 1873, to queries on the subject of expatriation directed by President Grant to all his Cabinet officers. In discussing the general question, Secretary Fish wrote (*Foreign Relations*, 1873, Part 2, p. 1187):[1]

> * * * and it will be remembered that Congress has asserted its right to *denationalize its own citizens*, and has defined one mode whereby the right of citizenship shall be forfeited, in the act of March 3, 1865, (13 Stat., p. 490.) which provides that, in addition to the other lawful penalties of desertion from the military or naval service of the United States, all persons who shall desert such service, or who, being enrolled, shall depart the jurisdiction of the district in which he is enrolled, or go beyond the limits of the United States with intent to avoid any draft into the military or naval service, duly ordered, *shall be deemed to have voluntarily relinquished and forfeited their rights of citizenship, or to become citizens*, and shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizens thereof." [Emphasis added.]

The Citizenship Board of 1906 (see *Perez*, 356 U.S. at 49–50) considered it a statutory provision for loss

---

sided in the United States" (emphasis added). See *Weedin* v. *Chin Bow*, 274 U.S. 657. And the Expatriation Act of 1868 itself says that "this Government has freely received emigrants from all nations, and invested them with the *rights of citizenship* * * *" (emphasis added). See also *Shelley* v. *United States*, 120 F. 2d 734, 735 (C.A.D.C.) (Act of July 2, 1940, 54 Stat. 715).

[1] This was less than a decade after the passage of the 1865 Act.

of citizenship. See H. Doc. No. 326, 59th Cong., 2d sess., p. 159. The State Department so construed it. See the remarks of Assistant Legal Adviser Flournoy at the hearings on the proposed Nationality Act of 1940 (Hearings before the House Committee on Immigration and Naturalization, 76th Cong., 1st sess., on H.R. 6127, at pp. 38, 132–133; cf. 186–187) and III Hackworth, *Digest of International Law* (1942), pp. 276–279. The Cabinet Committee which proposed the 1940 Nationality Act (see *Perez*, 356 U.S. at 52–56) drew upon the 1865 statute as the parent of its suggestion as to expatriation for desertion (Hearings, *supra*, pp. 491–492). And when Attorney General Biddle proposed, in 1944, that Section 401(j) be added to the 1940 Act, he mentioned that the comparable 1865 Act existed and was operative during World War I. See H. Rep. No. 1229, 78th Cong., 2d sess. (quoted, in part, *supra*, pp. 18–19). See also the letter of Secretary of War Stimson, dated March 6, 1943, recommending the provision which became Section 401(g) of the 1940 Act, and referring to the prior law (the 1865 Act, as amended), as dealing with loss of "citizenship" which can be restored. S. Rep. No. 382, 78th Cong., 1st Sess., p. 10.

3. Several of the 19th century cases which applied the 1865 Act, in the context of the right to vote, also characterize the statute broadly as relating to citizenship itself. See *Gotcheus* v. *Matheson*, 58 Barb. 152, 156, 157, 158, 159, 160 ("absolute forfeiture of citizenship," "forfeiture of citizenship", "deprive this class of persons of citizenship," "plaintiff's citizenship has been forfeited"); *Severance* v. *Healey*, 50 N. H. 448, 451 ("deprive any person of citizenship", per Jeremiah Smith, J.); *McCafferty* v. *Guyer*, 59 Pa. 109, 110 ("lost his citizenship under the Act of Congress of March 3d, 1865", per Strong, J.); *Huber* v. *Reily*,

53 Pa. 112, 114, 115, 116, 118 ("forfeiture of citizenship" (several times), "deprivation of his citizenship of the United States", per Strong, J.).[3]

4. The legislative history of the original 1865 Act does not cast much light, one way or the other, on its precise meaning, but the history of the 1912 amendment (restricting its application to peacetime desertion) is clear that the Congress then recognized the provision as one for full loss of nationality.

(*a*). The pertinent 1865 provision—Section 21 of the Act of March 3, 1865, 13 Stat. 487, 490, ch. 79—actually formed a part of an omnibus military measure, passed in the very closing days of the Second Session, of the Thirty-Eighth Congress, which was entitled "An Act to amend the several Acts heretofore passed to provide for the Enrolling and Calling out the National Forces, and for other Purposes." But the recorded history of that particular measure hardly mentions this provision.[4] It is clear that Section 21 was taken, at the end of the session, from comparable portions of other military bills which had earlier passed the Senate and the House (in differing forms) but had not been enacted into law, and the section was then incorporated, with little discussion, in the omnibus bill together with other unrelated provisions which Congress desired to make law. The true history of the provision, such as it is, is found in the debates on those earlier unsuccessful bills—S. 408 (passed by the Senate only) and H. R. 678

[3] Mr. Justice Strong, later a member of this Court, took pains in his *Huber* opinion to point out that Congress could not legislate with respect to voting in the states.

[4] The Act of March 3, 1865, was H. Jt. Res. No. 170; see Cong. Globe, 38th Cong., 2d Sess., pp. 907, 915, 927, 1005, 1294–5, 1332, 1335, 1358, 1361, 1378, 1380, 1386, 1398, 1404, 1412, 1413.

(passed by the House only), of the 38th Congress, 2d session.[5]

The debates on the parts of those bills concerned with the loss of the rights of citizenship for desertion and draft-evasion certainly stress the loss of the right to vote—disenfranchisement—and the inability to hold office as the primary consequences of the measure. See Cong. Globe, 38th Cong., 2d Sess., pp. 642–3, 1155; also p. 1378 (on the later provision in the omnibus bill). Such emphasis is quite understandable since, in 1865, that *was* the major consequence of the loss of citizenship; the country had virtually no laws barring aliens, who were as free to come and go as were citizens, and no laws providing for aliens' deportation; the great difference between citizens and aliens was in the right to vote and to hold office. Nevertheless, Senator Hendricks, in opposing the provision did characterize it in these general terms which unmistakably refer to citizenship, as such: "I submit to Senators that *it is a horrible thing to deprive a man of his citizenship, of that which is his pride and honor,* from the mere fact that he has been unable to report upon the day specified after being notified that he has been drafted." (Cong. Globe, 38th Cong., 2d Sess., p. 643 (emphasis added).

(*b*). The reports and the debate on the 1912 Act modifying the 1865 statute to apply only to peacetime desertions (Act of August 22, 1912, 37 Stat. 356)[6] are perfectly plain that Congress then viewed the 1865

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[5] For the history of H. R. 678, as a whole, see Cong. Globe, 38th Cong., 2d Sess., pp. 280, 298, 338, 974–980, 1034–5, 1074, 1114, 1154–5, 1160–1, 1169.

For the history of S. 408, as a whole, see Cong. Globe, 38th Cong., 2d Sess., pp. 489, 572–3, 604–616, 609, 631–643.

[6] H.R. 17483, 62d Cong., 2d Sess; H. Rep. No. 335; S. Rep. No. 910; 48 Cong. Rec. 2903–5, 9542, 11131.

statute as imposing loss of citizenship in the fullest sense, and that Congress wished to continue that provision only for wartime desertions and draft-evasion.[7]

The House Report (H. Rep. No. 335, 62d Cong., 2d Sess., p. 2) dwells on the severity of the 1865 Act as applied to peacetime desertions, and declares that the effect of the 1865 Act

> has been, and will continue to be, so long as it remains on the statute book, *to make outlaws of thousands of American citizens* who, as boys or young men, from homesickness, dissatisfaction with military life, or without consideration of the fearful penalty imposed, desert from the Army or Navy.
>
> There are in the United States today *thousands of men who are literally men without a country* and their numbers will be constantly added to until the drastic civil-war measure which adds this heavy penalty to an already severe punishment imposed by military law, is repealed.[8] [Emphasis added.]

On the floor of the House, Representative Roberts, the author of the bill, emphasized the harshness of the 1865 Act with respect to peacetime deserters, and repeated that "we have in this country today thousands upon thousands of young men of American birth who are literally men without a country"; he used the phrases "loss of citizenship", "now robbed

---

[7] The 1912 amendment left the draft-evasion provisions of the 1865 Act in effect, but they were, of course, inoperative from the Civil War to the passage of selective service legislation in World War I.

[8] This House Report also quotes from reports and communications of the Secretary of the Navy clearly revealing that he interpreted the 1865 Act as depriving deserters of citizenship.

The Senate Report (S. Rep. No. 910, 62d Cong., 2d Sess.) is not as explicit as the House Report, but it reveals the same understanding of the 1865 Act.

of citizenship", and "loss of rights of citizenship" interchangeably. 48 Cong. Rec. 2903–4. He also referred to a provision in the bill for mitigation and clemency by the President as a provision that the President "could restore citizenship" in those cases "where it had been forfeited prior to the passage of the act". 48 Cong. Rec. 2904.[9] There is no doubt that the 1912 Congress—and prior Congresses in which similar ameliorative bills had been considered—understood the 1865 statute to provide for denationalization for desertion and draft-evasion.

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[9] The Senate debate (48 Cong. Rec. 9542) was perfunctory, dwelling on a minor Senate amendment as to reenlistments.

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IN THE

Supreme Court of the United States

October Term, 1959

No. 29

ARGYLE R. MACKEY, Commissioner of Immigration and Naturalization, and WILLIAM P. ROGERS, Attorney General of the United States,

Appellants,

v.

FRANCISCO MENDOZA-MARTINEZ,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Northern Division

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

JACK WASSERMAN,
DAVID CARLINER,
Attorneys for American Civil Liberties Union,
902 Warner Building,
Washington 4, D. C.

Of Counsel:
OSMOND K. FRAENKEL,
ROWLAND WATTS.

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Appellee.

On Appeal From the United States District Court for the Southern District of California, Northern Division

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

Statement of Interest

This brief *amicus curiae* is submitted with the consent of the parties, filed with the Clerk of this Court.

The American Civil Liberties Union, a national non-profit organization established in 1920, is committed to the inseparable purposes of preserving the democratic principles for which our government was established and to maintaining our civil liberties. Together with all Americans who prize the blessings of United States citizenship and the privileges of freedom which it brings, it seeks to guard against arbitrary deprivations of our birthrights.

It believes that there has been an increasing tendency on the part of Congress, through expatriation laws, to encroach upon the right of American citizenship given to individuals under the Fourteenth Amendment to our Constitution. It submits this brief in an effort to assist the Court in its analysis of this encroachment and the constitutional problems thereby raised.

Statute Involved

The Nationality Act of 1940 as amended (54 Stat. 1137, 58 Stat. 4, 746; 8 U. S. C. 801) provided:

> "Section 401. A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> • • •
>
> "(j) Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States."

Question Presented

Is the provision of 401(j) of the Nationality Act of 1940 decreeing forfeiture of citizenship by a native-born American who remained outside the United States to avoid military service, within the constitutional power of Congress?

Statement

Appellee, Francisco Mendoza-Martinez, born in the United States in 1922, became a citizen of the United States and of Mexico at birth. In 1942 he departed for Mexico for the purpose of evading service in the Armed Forces of the United States. His return to the United States in 1946, was followed by a conviction in 1947 upon a plea of guilty

for violation of Section 11 of the Selective Service and Training Act of 1940 (50 U. S. C. App. 311). In 1953 appellee was ordered deported as an alien. This declaratory judgment action was filed in the United States District Court for the Southern District of California pursuant to 8 U. S. C. 903 to establish his claim to American citizenship. In a memorandum and order filed September 24, 1958, the District Court, following the reasoning of this Court in *Trop* v. *Dulles*, 356 U. S. 86, ruled that 401(j) of the Nationality Act of 1940 was unconstitutional and that the appellee was therefore entitled to a declaration of citizenship. Rejecting the contention that 401(j) was a reasonable exercise of the foreign affairs powers of Congress, the Court below said:

> "The petitioner's act in departing for Mexico for the purpose of evading training and service in the armed forces is to be condemned. It was an act for which he should have been and was punished. Such conduct, however, does not show a renunciation of his citizenship or an allegiance to a foreign power. While physically present in Mexico, the petitioner committed no act which would import a dilution of his American citizenship or which might conceivably embarrass our government. So far as the record shows, the conduct of the petitioner in Mexico was no different than the conduct of law-abiding American citizens who were lawfully in Mexico on visas or passports. It could not be contended that their physical presence there might be potentially embarrassing to the American Government. *I am unable to find any rational relationship between the power of Congress to regulate foreign affairs and the enactment by Congress of Section 401(j).*" (Emphasis supplied.)

The contention that there was a proper exercise of the war powers by Congress was likewise rejected. The Court said:

> "If the plaintiff had remained in the United States and evaded service under the Selective Service and

> Training Act, he would have committed the same offense and would have suffered the penalty for such violation, but he would not have been subject to expatriation.
>
> "It is my conviction that the enactment of Section 311 (50 U. S. C. App. 311) accomplished all legitimate purposes that Congress could have reasonably considered in the enactment of Section 401(j) and the war powers of Congress is extremely tenuous and ineffectively remote. *I am unable to find that the enactment of Section 401(j) could reasonably be calculated to implement war powers possessed by Congress.* (Emphasis supplied.)
>
> "My views on Section 401(j) are similar to the views entertained by Mr. Justice Brennan on Section 401(g) in his concurring opinion in *Trop* v. *Dulles*."

The judgment of the District Court was entered on October 20, 1958, and a notice of a direct appeal to this Court, pursuant to 28 U. S. C. 1252, was filed on November 17, 1958. Probable jurisdiction was noted on March 9, 1959.

Summary of Argument

Section 401(j) of the Nationality Act of 1940 was constructed from the same mold as 401(g), which this Court found invalid in *Trop* v. *Dulles*, 356 U. S. 86. The Attorney General and Congress relied upon the Civil War statute of March 3, 1865 (13 Stat. 490, 37 Stat. 356) as amended, for precedent in the enactment of 401(j). House Report 1229, 78th Cong., 2nd Sess., p. 2. It likewise was the precedent for 401(g). The cases all recognize this Civil War statute as being highly penal. *Huber* v. *Reily*, 53 Pa. St. 112 (1866); *Kurtz* v. *Moffitt*, 115 U. S. 487, 501; *Trop* v. *Dulles*, 356 U. S. 86, 94, 108.

The specific legislative history of 401(j), moreover, reveals a distinct purpose on the part of Congress to

punish the draft delinquent. Congressional leaders stated this as their objective in the debates leading to the passage of the statute, 90 *Cong. Rec.* 3261-2, 7629. The Department of Justice regarded expatriation and banishment from the United States as the proper substitute for criminal prosecution of the draft evader who absconded to foreign shores. Department of Justice Circular No. 3893, December 5, 1944, Appendix herein. In the instant case, by reason of appellee's return to the United States, appellants would visit him with expatriation, banishment and criminal punishment. However, the expatriation and banishment would be imposed not as part of the criminal conviction—because none is required under the statute—and without any of the safeguards of a civil or criminal trial.

The punishment of expatriation and banishment sought to be meted out to appellee is the naked vengeance, the prescription of reprimand without rehabilitation, which is condemned in the *Trop* case. Trop might reenlist or become reactivated during wartime and regain his citizenship [8 U. S. C. 801(g), 8 U. S. C. 1481(a)(8)]. No statutory provision exists for restoration of citizenship for the draft delinquent who has departed to avoid military service or training. He is not only expatriated but permanently barred from the United States and all his ties here. 8 U. S. C. 136(d)(1); 8 U. S. C. 1182(a)(22).

The imposition of exile and expatriation for the draft delinquent find no justification in the foreign affairs powers. Neither the history of 401(j) nor the background of this case reveal any foreign involvement, any defection to a foreign power, or any political allegiance to another country other than the law-abiding presence of a dual national in the country of one of his nationalities. There is no more reasonable relationship to the war powers in expatriating the draft delinquent than the deserter. In each case punishment is the objective rather than the raising of an

army. Expatriation and exile permanently preclude the draft delinquent from changing his mind or seeing the error of his ways. Expatriation and exile of the draft delinquent is not a proper exercise of sovereignty.

Finally, since the penalty of denationalization may be imposed without a prior conviction for the proscribed conduct, Section 401(j) comes within the ban of *Huber v. Reily, supra*, and *Kurtz v. Moffitt, supra*. None of the safeguards of a criminal trial are afforded an expatriated citizen before the sanction is imposed against him. And while he is not deprived of his right to assert his citizenship in the courts of the United States, the citizen abroad who has been denationalized will either be limited to a trial *in absentia*, or must submit himself as an alien in the administrative agencies and courts of the United States with all of the disabilities which that status entails. 8 U. S. C. 1227, 1503. Although the handicaps of the expatriated citizen who is in the United States are not as severe, the initial burden is upon him to prove his citizenship, as the appellants concede (Appellants' Brief, pp. 31-32) rather than upon the Government to establish denationalization.

The expatriation of a national of the United States, in these circumstances, is a denial of due process.

Argument

Before turning to the background of Section 401(j) of the Nationality Act of 1940 and the constitutional issues it presents, we will first review the historical development of our expatriation laws for a fuller understanding of the concepts which gave rise to those laws. It will be seen that originally an individual was denied the right to expatriate himself without the consent of his sovereign. The right to become an expatriate, without regard to the

sovereign's will, was thereafter proclaimed as a natural and inherent right of all people (15 Stat. 223). However, the right was denied during wartime and was also not extended to those under twenty-one. It was also denied to our citizens as long as they remained in the United States.

With the enactment of the Nationality Act of 1940, earlier limitations were cast aside. Congress authorized expatriation in several cases without departure to foreign shores. Wartime expatriation was sanctioned as was the expatriation of persons under twenty-one. Previously, the individual fought his sovereign for the right to cast off his citizenship. After 1940, it was the sovereign who fought for the right to impose expatriation upon the individual. Originally, expatriation was the voluntary abandonment of citizenship. Now it is asserted by appellants that performance of proscribed acts, even if it does not evince attachments to a foreign government, is the renunciation of American citizenship which spells expatriation. How far may the Government proceed in compelling a native-born citizen to become an expatriate against his will, under what circumstances may it do so, and to what constitutional safeguards is the citizen entitled? These are the issues posed by this litigation.

A. The American Doctrine of Expatriation

The American colonists came to these shores with a background of English common law which included the doctrine that citizenship was immutable. Under this doctrine, no man might abjure his native country nor the allegiance which he owed his sovereign. *Coke's Littleton*, 129(a); *MacKenzie* v. *Hare*, 239 U. S. 299; 9 *Op. Atty. Gen.* 356. This common law principle, of course, resulted in conflicting claims to the allegiance of individuals who became naturalized under our laws. It was the subject of

controversy between the United States and Great Britain,[1] between Jefferson and Hamilton [2] and between members of the judiciary of the various state courts.[3]

Thomas Jefferson, the great exponent of the theory emphasizing the rights of the individual as against those of the government, was the first American to advocate the principle of expatriation. In 1779 he drafted the Virginia law code, in which expatriation was declared to be:

> "a natural right which all men have of relinquishing the country in which birth or other accident may have thrown them, and seeking subsistence and happiness wheresoever they may be able, or may hope to find them."[4]

In 1868; Congress acknowledged that the rights of the individual prevailed over the sovereign's claim to perpetual allegiance. The Act of July 27, 1868 (15 Stat. 223) declared that "the right of expatriation is a natural and inherent right of all people."

Responding to Presidential requests,[5] the Expatriation Act of 1907 (34 Stat. 1228) defined the methods by which expatriation might be accomplished. Naturalization in a foreign state and subscription to a foreign oath of allegiance were the two recognized means of expatriation under this law. Expatriation during wartime was for-

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[1] The impressment of British seamen who had become Americans was one of the causes of the War of 1812. *II Richardson, Messages and Papers of the Presidents*, p. 485.

[2] *Tsiang, The Question of Expatriation in America Prior to 1907*. p. 28. Hamilton believed that the right of expatriation would encourage desertion and was, therefore, subversive of government. *IV Works of Alexander Hamilton*, p. 256.

[3] *Tsiang, supra*, pp. 69-70.

[4] *Tsiang, supra*, pp. 25-56.

[5] See annual messages of Presidents Grant, Cleveland and Theodore Roosevelt in 1873, 1884, 1885 and 1904. *Richardson, Messages and Papers of the Presidents*, Vol. VII, pp. 239, 291, Vol. III, p. 336, Supp. 2 (Lewis), p. 851.

bidden. The theory behind this prohibition was that in time of war "the Government should be able to control the services of every citizen, and the right of changing allegiance should not exist when the State is in peril." *House Doc. 326*, 59th Cong., 2nd Sess., p. 28. Secretary of State Fish said:

> "to admit the right of expatriation, 'flagrante bello', would be to afford a cover to desertion and reasonable aid to the public enemy."

The Nationality Act of 1940, as amended (54 Stat. 1137, 58 Stat. 4, 58 Stat. 677; 8 U. S. C. 802) expanded the grounds of expatriation for native-born citizens to include foreign military service, foreign civil service, voting in foreign elections, renunciation before a consul abroad, renunciation during wartime, draft dodging, treason and desertion. Wartime expatriation was no longer barred. On the contrary, expatriation for desertion, draft dodging and by renunciation in the United States [8 U. S. C. 801(g), (i) and (j)] might only take place during wartime or a national emergency. Expatriation for desertion, treason and by renunciation during wartime [8 U. S. C. 801(g), (h) and (i)] was not dependent upon departure from the United States. Congress, however, acknowledged that "Ordinarily, departure from the country of which a person has been a national is regarded as an essential element of expatriation". *Hearings Before House Immigration Committee on H. R. 6127, superseded by H. R. 9980*, 76th Cong., 1st Sess., p. 492. The age of expatriation was reduced from twenty-one to eighteen, *Hearings, supra*, p. 492, 493. The Immigration and Nationality Act of 1952 (66 Stat. 267; 8 U. S. C. 1481) substantially reenacted the expatriation provisions of the 1940 Act. Provision is now made for the expatriation of dual nationals at birth who remain abroad for three years and claim the benefits of the foreign nationality without taking an oath of allegiance to the United States. 8 U. S. C. 1482. Under the 1952 Act violation of the Selective Training and Service Act creates a presumption that

departure from the United States was for the purpose of evading the draft. 8 U. S. C. 1481(a)(10). By amendment in 1954, conviction for communist activity has been added as a ground of expatriation. 68 Stat. 1146; 8 U. S. C. 1481(a)(9).

Throughout the years, we have, therefore, steadily increased the statutory grounds for expatriation. Today, we have more stated grounds for expatriation than any other country in the world.[6] Other countries, particularly the dictatorships may be more arbitrary in depriving their citizens of their birthright.[7] We, on the other hand, have recognized that expatriation is a natural right of the individual and that it is his "voluntary renunciation or abandonment of nationality and allegiance" which is the essence of this natural right. *Perkins* v. *Elg*, 307 U. S. 325, 334.

B. Background of Enactment of 401(j) of the Nationality Act of 1940

On March 3, 1865, before the right of expatriation was recognized as natural and inherent right of all people, Congress enacted a bill providing:

> "That, in addition to the other lawful *penalties* of the crime of desertion * * * all persons who have

[6] Under the 1952 Immigration and Nationality Act (8 U. S. C. 1481, 1482) there are twelve stated grounds for the expatriation of native-born citizens. Most foreign countries recognize foreign naturalization as a ground of expatriation. Only Liberia and the Philippines appear to recognize the taking of a foreign oath as a basis for expatriation. Andorra alone authorized expatriation for participation in a foreign election. Only four countries (Bulgaria, Greece, Poland and Turkey) sanction expatriation upon the ground of draft evasion. *Laws Concerning Nationality* (United Nations Legislative Series, 1954).

[7] In the Union of the Soviet Socialist Republics expatriation may be decreed by order of the Presidium of the Supreme Council. *Laws Concerning Nationality, supra*, p. 463.

> deserted the military or naval service of the United States, * * * shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship * * * and all persons who, being duly enrolled, shall depart the jurisdiction of the district in which he is enrolled, or go beyond the limits of the United States, with intent to avoid any draft into the military or naval service, duly ordered, shall be liable to the *penalties* of this section." (Emphasis supplied.) 13 Stat. 490.

In *Trop* v. *Dulles*, 356 U. S. 86, 89, this Court observed that the meaning of the phrase "rights of citizenship" was not entirely clear. No case was ever presented under the 1865 Act in which an attempt was made to deport a violator of its provisions.

What is clear, however, is that the 1865 Act prescribed penalties. The language of the Act so states. The first and leading case under the Act was *Huber* v. *Reily*, 53 Pa. St. 112 (1866) in which Judge (later Mr. Justice) Strong noted that the Act was "highly penal" and that the penalty of forfeiture of citizenship could not be imposed without providing the constitutional safeguard given the accused in a criminal proceeding. He said:

> "It (the act) means that the forfeiture which it prescribes, like all other penalties for desertion, must be *adjudged* to the convicted person, after trial by court-martial, and sentence approved."

The decision was later approved, and its result adopted by this Court. *Kurtz* v. *Moffitt*, 115 U. S. 487, 501. In submitting the draft of the 1940 Nationality Act to Congress, the Secretary of State, the Attorney General and the Secretary of Labor referring to Sections 1996 and 1998 of the Revised Statutes which replaced the Act of March 3, 1865, stated:

> "The provisions of Sections 1996 and 1998 are distinctly penal in character." *Hearings Before House Immigration Committee on H. R. 6127, superseded by H. R. 9980*, 76th Cong., 1st Sess., p. 492.

In 1912 the 1865 statute was amended to make it inapplicable in time of peace (37 Stat. 356) and it remained in effect until repealed by the Nationality Act of 1940 (54 Stat. 1172).

During World War II, the Department of Justice discovered:

> "that in the western district of Texas, in the vicinity of El Paso alone, there were over 800 draft delinquents recorded in the local Federal Bureau of Investigation office, born in this country and, therefore, citizens who had crossed the border into Mexico for the purpose of evading the draft * * *." *House Report 1229*, 78th Cong., 2nd Sess., p. 2.

Beset with the problem of punishing these draft delinquents, the Attorney General determined to expatriate and banish them from the United States by permanently barring their return. This would both punish such persons for their crime as well as eliminate the expense incident to criminal prosecution and the inconvenience of keeping their files open. J. P. Sharon of the Immigration and Naturalization Service writing on *Loss of Citizenship by Draft Dodgers* in the Monthly Review of the Service for February, 1948, page 97, makes this clear:

> "In the Fall of 1943, the Department of Justice took stock of the numerous cases of citizens who had registered with their local draft boards and departed from the United States. They declined to return to this country when called upon to do so. * * * By such action, these individuals sought to elude United States military service and to escape prosecution for violation of the Selective Training and Service Act of 1940 as amended. The Attorney General noted that these persons could not be extradited and that prosecutions for violation of the 'draft' act would have to wait upon the return of these draft dodgers to our jurisdiction. It was felt that such draft delinquents were unworthy of citizenship.
>
> "In a report to Congress, the Attorney General brought the above situation to its attention and

> recommended legislation looking to the expatriation of such draft delinquents, as well as to their exclusion from the United States when they attempted to return. By such action, the expense incident to their prosecution for 'draft' violations would be obviated."

On February 16, 1944, the Attorney General addressed a letter to the Chairman of the Senate Immigration Committee, calling his attention to the many citizens who had left the country to avoid military service. He stated:

> "While such persons are liable to prosecution for violation of the Selective Service and Training Act of 1940, if and when they return to this country, it would seem proper that in addition they should lose their United States citizenship. Persons who are unwilling to perform their duty to their country and abandon it during its time of need are much less worthy of citizenship than are persons who become expatriated on any existing grounds.
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> • • •
>
> "Adequate precedent exists for the suggested legislation in that during the First World War a statute was in force which provided for the expatriation of any person who went beyond the limits of the United States with intent to avoid any draft into the military or naval service (37 Stat. 356)."[8] *House Report 1229*, supra, pp. 2-3.

Thus, the Attorney General invoked the "highly penal" 1865 Act (as amended in 1912) as precedent for the statute which became 401(j) of the Nationality Act of 1940. Neither in the reports of the Immigration Committees (House Report 1229, Senate Report 1075, 76th Congress, 2nd Session) nor in the Congressional debates is a word mentioned about foreign involvements or the exercise of the

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[8] Identical language was employed in a letter of the Attorney General to the Director of the Bureau of the Budget on September 18, 1944.

war powers. On the contrary, members of Congress affirmatively indicated that punishment of the draft delinquent was the objective sought.

Chairman Dickstein of the House Immigration Committee who piloted the bill through the House of Representatives stated:

> "I would classify this piece of legislation as a bill to denaturalize and denationalize all draft dodgers who left this country knowing that there was a possibility that they might be drafted in this war * * *.
>
> * * *
>
> "Any man, any American, who leaves this country for the purpose of not serving in time of war is a traitor, in my judgment." 90 Cong. Rec. 3261-2.

Senator Russell, Chairman of the Senate Immigration Committee, likewise observed on the floor of the Senate (90 Cong. Rec. 7629):

> "Certainly those who, having enjoyed the advantages of living in the United States, were unwilling to serve their country or subject themselves to the Selective Service Act, should be penalized in some measure."

From these statements, it is evident that the Congressional sponsors of the legislation were intent on punishing persons who committed the crime of draft evasion. They were not concerned with means of raising and maintaining armies or with avoidance of foreign embarrassments.

The bill became Public Law No. 431 of the 78th Congress and on December 5, 1944, the Attorney General dispatched Department of Justice Circular No. 3893 to all United States Attorneys, to the field offices of the Federal Bureau of Investigation and to the Immigration and Naturalization Service. The text of this circular is set forth in the appendix. In substance, it advised that with the enactment of Public Law 431, draft delinquents of dual nationality who

had left our shores were "ineligible for reentry, either as debarred aliens or expatriates" and their cases "may be closed in the offices of the United States Attorneys and the Federal Bureau of Investigation." The circular ended:

> "Where any doubt is entertained as to the disposition of any delinquency case which may fall within the purview of Public Law No. 431, the matter should be taken up with the *Criminal Division* in the Department." (Emphasis supplied.)

Thus, to avoid the expense of criminal prosecution and the inconvenience of maintaining cases in a pending status, files were closed and American citizenship was terminated.

I

Section 401(j) imposes a punishment barred by the Eighth Amendment.

In *Trop* v. *Dulles*, 356 U. S. 86, this Court held that denationalization could not be inflicted as punishment for desertion, that substance rather than the form of the statute controlled, that the nature of the statute depended upon the evident purpose of the legislature, and that "denationalization as a punishment is barred by the Eighth Amendment." Mr. Chief Justice Warren observed in his opinion at pages 93-94:

> "Section 401(g) decrees loss of citizenship for those found guilty of the crime of desertion. It is essentially like Section 401(j) of the Nationality Act, decreeing loss of nationality for evading the draft by remaining outside the United States. • • • While Section 401(j) decrees loss of citizenship without providing any semblance of procedural due process whereby the guilt of the draft evader may be determined before the sanction is imposed, Section 401(g), the provision in this case, accords the accused deserter at least the safeguard of an adjudication o guilt by court martial."

In answer to the distinctions which appellants attempt to make between the instant case and *Trop* v. *Dulles*, we submit the following comments:

1. The Civil War and World War history of 401(j) is identical with that of 401(g). As this Court recognized in the case of *Trop* v. *Dulles*, these antecedents were highly penal and loss of citizenship, like other penalties, only followed a conviction.

2. With the codification of the Nationality Laws in 1940, the paths of the two sections parted. While expatriation was continued for deserters in 401(g), the Cabinet Committee which submitted the proposed codification to Congress omitted that section of the Act of March 3, 1865 (13 Stat. 490) which provided for expatriation of draft evaders. Although Congress enacted the Selective Training and Service Act on September 16, 1940, and adopted the codification of the Nationality Laws a month later in the same session on October 14, 1940, it did not at that time provide for the expatriation of draft delinquents.

Thus, whatever significance may attach to the fact that the "expert Cabinet Committee on which Congress quite properly and responsibly relied * * * stated that the provision in question 'technically is not a penal law'" [See *Trop*, Dissenting Opinion of Mr. Justice Frankfurter, 356 U. S. at 125 (fn. 4)] is not available here. Section 401(j), as we have noted above, became a part of the Nationality Act at the request of the Attorney General whose concern was solely to impose an additional penalty upon draft evaders. The Congressional debate reaffirmed this purpose.

The history of 401(j), therefore, as detailed above in Point B, reveals a distinct and definite Congressional purpose to punish the draft evader, even were one to assume that 401(g) had no such purpose. Extradition was not possible for draft evaders who went to foreign shores. Accordingly, in lieu of extradition and criminal prosecution

in the United States, they were to be punished by denationalization and permanent exclusion from the United States. Under Section 3 of the Immigration Act of 1917, as amended [58 Stat. 746, 8 U. S. C. 136(d)(1)] and Section 212(a)(22) of the Immigration and Nationality Act [66 Stat. 184, 8 U. S. C. 1182(a)(22)], persons who have been guilty of draft dodging by departure from the United States are permanently barred from entering the United States.

The language of Mr. Chief Justice Warren, in the *Trop* case is particulary pertinent here (356 U. S. at pp. 96-97):

> "If the purpose of the statute imposes a disability for the purpose of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal.
>
> "* * * Plainly legislation prescribing punishment for the crime of desertion is penal in nature. If loss of citizenship is substituted for imprisonment, it cannot fairly be said that the use of this particular sanction transforms the fundamental nature of the statute."

The imposition of loss of citizenship for the draft evader who leaves the United States is likewise clearly a penalty.

3. Although appellee, Mendoza-Martinez, was convicted of draft evasion, such conviction is not a necessary or essential prerequisite for a finding of expatriation. See *Perez* v. *Brownell*, 356 U. S. 44, *Matter of C. A.*, 2 I & N Dec. 378.

4. Expatriation was not imposed herein as a consequence of the draft evasion conviction but rather as a result of the administrative finding by the Board of Immigration Appeals that appellee had departed and remained outside the United States for the purpose of evading the draft.

The crime of draft evasion as defined in the statute (50 U. S. C. App. 311) does not include all of the elements

required by Section 401(j). The appellee's conviction would not support his expatriation in the event Section 401(j) provided for a criminal trial.

5. Appellants seek to avoid the application of the *Trop* case, upon the ground that appellee in the instant case is a dual national, and the fact that the relatively few litigated cases (the number of which is not disclosed) all involved dual nationals.

The short answer to this contention is that the statute applies equally to dual nationals and to citizens who possess only American nationality. (See Circular No. 3893 of the Department of Justice, reproduced in the Appendix.) For those who are not dual nationals the statute produced statelessness, with all the fears and loss of rights noted by this Court in the *Trop* case. For both the dual national and those possessing American nationality alone, the statutory scheme would visit expatriation and exile. This naked vengeance, in the words of Mr. Justice Brennan:

> "* * * constitutes the very antithesis of rehabiiitation, for instead of guiding the offender back into useful paths of society, it excommunicates him and makes him, literally, an outcast." 356 U. S. 86, at 111.

As in the *Trop* case, therefore, it stretches the imagination to establish a rational relation of mere retribution to the ends purported to be served by the expatriation of the draft dodger.

6. The factor which distinguishes *Trop* from the present case reinforces our position that denationalization here violates the Eighth Amendment as a cruel and unusual punishment. The dissenting opinion of Mr. Justice Frankfurter (*Trop*, 356 U. S. at 125) suggests that denationalization cannot be said to be a cruel and unusual punishment for an offense that is capital. If this is true, it seems clear that to impose statelessness and exile upon the appellee is

indeed a punishment, and one that is cruel and vengeful, in relation to an offense for which the maximum penalty is five years confinement and $10,000 fine. (Section 11, Selective Training and Service Act of 1940, 54 Stat. 894; 50 U. S. C. App. 311.) *Weems* v. *United States,* 217 U. S. 329; *O'Neil* v. *Vermont,* 144 U. S. 323; "The Expatriation Act of 1954", 64 Yale Law Journal 1164, fn. 131 at p. 1188.

II

Expatriation and Exile of the Draft Delinquent Is Not Justified by the Exercise of the Foreign Affairs Powers

Perez v. *Brownell,* 356 U. S. 44, sustained the expatriation of an individual who voted in a foreign political election upon the ground that the statute was a valid exercise of the foreign affairs powers of Congress. The statutory history revealed Congressional concern over participation by Americans in the politics of foreign countries. "Taking an active part in the political affairs of a foreign state by voting in a political election therein is believed to involve a political attachment and practical allegiance thereto which is inconsistent with continued allegiance to the United States * * *." *Hearings Before House Immigration Committee on H. R. 6127, superseded by H. R. 9980,* 76th Cong., 1st Sess., p. 491.

Unlike the legislative background of 401(e), the history of Section 401(j) discloses no concern at all by Congress or by the Executive with any impact the problems of fugitive draft evaders might have had upon our international relations. The guidance which Congress received from the Executive, and upon which it relied, came not from the State Department, which one might suppose to be its source were the problem a matter of foreign affairs (*Perez* v. *Brownell,* 356 U. S. 44, 56), but came rather from the Attorney General.

The letter which Attorney General Biddle wrote to Congress referred to draft delinquents "who had crossed the border into Mexico for the purpose of evading the draft" but it contained no reference to any issues this may have posed for United States-Mexican relations. No suggestion at all is made that "international complications" (Appellants' Brief, p. 19) had been caused by the fugitive draft evaders. Although many of the fugitives, like the appellee, were dual nations, the question of foreign allegiance of the draft evaders was not even mentioned (H. Rep. 1229, 78th Cong., 2nd Sess., pp. 2-3).[9]

The Attorney General's sole concern, as we have observed above, was to impose a penalty upon the fugitive draft evader *in addition* to the punishment provided by the Selective Service and Training Act, *ibid.*

Appellants nonetheless argue that the "potentiality of foreign embroilment through fugitive draft evaders is not fanciful", and they suggest that the statute is reasonably related to the foreign affairs power because "the termination of citizenship terminates the (international) problem." (Appellants' Brief, pp. 22-24, citing *Perez*, 356 U. S. at 60.)

The impediment in the appellants' argument is that whatever embroilment may follow from the problem of fugitive draft evaders is neither caused by their United States citizenship nor is it solved by expatriation. The obligation to serve in the armed forces was imposed not merely upon citizens but upon "every other male person residing in the United States", within certain age limits. Selective Training and Service Act of 1940, Section 3(a); 54 Stat. 885; 50

[9] In contrast to the State Department and Congressional silence on any international implications arising from the flight of fugitive draft delinquents between 1940, when the Nationality Act went into effect, and 1944, when Section 401(j) was enacted, both the Secretary of State and Congress directed attention to other aspects of the Selective Training and Service Act which did have international repercussions. Cf. *Moser* v. *United States*, 341 U. S. 41.

U. S. C. App. 303(a). Cf. *McGrath* v. *Kristensen*, 340 U. S. 162.

The fugitive who flees the United States to escape the draft may, therefore, be a resident alien as well as a citizen. 32 Code of Federal Regulations, 611.12. International problems might well arise, as appellants suggest, if other nations became "refuges or centers for American draft evaders" (Appellants' Brief, p. 20). But the basis for protest would be the grant of refuge for draft delinquents whether citizens or not. Such does not exist here.

The possible repercussions upon United States relations with a foreign country which harbored violators of our laws would not be different if the fugitives were rumrunners (see especially *Ford* v. *United States*, 273 U. S. 593), or tax evaders, bank robbers, narcotic offenders (see concurring opinion of Mr. Justice Brennan in *Trop*, 356 U. S. at 113), spies (Cf. *Rosenberg* v. *United States*, 346 U. S. 273), saboteurs and manufacturers of defective war material (Cf. 18 U. S. C. 2151-2156), persons who obstruct the draft or interfere with the armed forces (Cf. *Schenck* v. *United States*, 249 U. S. 47), plotters against friendly foreign governments (Cf. *Wiborg* v. *United States*, 163 U. S. 632, and *Gayon* v. *McCarthy*, 252 U. S. 171), or pirates (Cf. *United States* v. *Smith*, 5 Wheat. 153), none of whom is denationalized by flight from the jurisdiction of the United States.

The nationality of the criminal is irrelevant to the offense. So, too, is the nationality of the draft delinquent. The offender's nationality is equally irrelevant to the effect which a foreign refuge for American law violators would have upon our relations with the country which offered such refuge. Clearly, it is the harboring of violators of our laws which would impair the relations, not the grant of refuge merely to those among the fugitive offenders who happened to be United States nationals.

The problem is not solved by denationalization. The fugitive draft evader is not relieved of his obligation to serve in the armed forces by his flight. Nor is he absolved of guilt for his crime, as the appellee's experience witnesses.[10]

The issue here, then, is not at all like that in *Perez*, where "termination of citizenship terminates the problem" because the expatriate's obligation to the United States is thereby dissolved and his involvement in foreign political elections is thereafter of no concern to this country. Termination of the appellee's citizenship terminates no international problem if in fact one exists. Termination of the appellee's citizenship performs one sole function—the one which Congress and the Attorney General intended—that of imposing upon him an additional punishment.

III

Expatriation and Exile for Draft Evasion Is Not a Proper Exercise of the War Powers

We have noted in our historical summary that for many years expatriation could not take place during wartime. Secretary of State Fish feared that it would encourage desertion and aid to the enemy. Under 401(j) of the Nationality Act of 1940, instead of encouraging the citizen to return to the United States, instead of giving him another opportunity to serve his country, we denationalize and banish him forever. Under 401(g) restoration to active duty during wartime or reenlistment during wartime restored nationality. No comparable provision is made in 401(j). It is, therefore, obvious that rehabilitation was less a concern of Congress in the instant situation.

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[10] Appellee, in the Government's view then an alien, was prosecuted and convicted for violation of the Selective Training and Service Act following his return to the United States.

The Congressional debates and the history of 401(j) indicate beyond any doubt that Congress desired to punish the draft evader. The language of Mr. Justice Brennan with regard to the deserter in *Trop* v. *Dulles*, 356 U. S. 109, 113, is equally applicable here to the draft evader:

> "It is difficult, indeed, to see how expatriation of the deserter helps wage war except as it performs that function when imposed as punishment. It is obvious that expatriation cannot in any wise avoid the harm apprehended by Congress. After the act of desertion, only punishment can follow, for the harm has been done. * * *
>
> "* * * it stretches the imagination excessively to establish a rational relationship of mere retribution to the ends purported to be served by the deserter. * * * As citizens we are also called upon to pay our taxes and to obey the laws, and these duties appear to me to be fully as related to the nature of our citizenship as our military obligations. But Congress' asserted power to expatriate the deserter bears to the war powers precisely the same relation as its power to expatriate the tax evader would bear to the taxing power."

Appellants' argument that Section 401(j) is valid because of "its close and direct connection with the war power" (Appellants' Brief, p. 25) is necessarily foreclosed by the decision of this Court in *Trop*. As the opinion of the Chief Justice declared, even if the statute is an exercise of war power, it must be judged as a penal law "because it imposes the sanction of denationalization for the purpose of punishing transgression of a standard of conduct prescribed in the exercise of that power." *Trop*, 356 U. S. at 97.

The contention, therefore, that expatriation of the draft evader may be sustained as a valid exercise of the war power should be rejected.

IV

Expatriation and Exile for Draft Evasion Is Not a Proper Exercise of Sovereignty

Apart from the powers to regulate foreign relations and to conduct war, the appellants seek to sustain Section 401(j) because it is said to derive from the "inherent rights of sovereignty." (Appellants' Brief, pp. 25-30.)

The Government's argument, we believe, is based upon erroneous premises. As to its first premise that the right to expatriate flows from the right to enforce military duty, the power to raise an army by conscription is not the power to denationalize an unwilling conscript, any more than the power to tax is the power to expatriate. The opinions of Mr. Chief Justice Warren and of Mr. Justice Brennan in *Trop* dispose of the contention repeated here by the appellants that denationalization here "cannot be deemed arbitrary" because the "fugitive draft evader reject(s) the highest duty of citizenship—a call to service—(and) also refuses to submit to this country's jurisdiction over him." (Appellants' Brief, pp. 28-29.)

What applies to the express war power necessarily governs the powers which are inherent in sovereignty. Section 401(j) has no greater "rational relation" (*Trop*, concurring opinion of Mr. Justice Brennan, 356 U. S. at 114) to the power of sovereignty than Section 401(g) has to the war power.

Appellants' second premise—that "one who removes himself physically from the jurisdiction of the country in order to elude the grasp of our law * * * terminates the contract" (of citizenship)—(Appellants' Brief, p. 29), is rebutted by the footnote on page 27 of their brief (Footnote 18, citing *Blackmer* v. *United States*, 284 U. S. 421), as well as by their citation of *Kawakita* v. *United States*, 343 U. S. 717, 736, in which it was said: "An American

citizen owes allegiance to the United States wherever he may reside."

The power which the Federal Government concededly has to compel citizens abroad to return to the United States "whenever the public interest requires it" (*Blackmer* v. *United States*, 284 U. S. 438), derives from the principle that the United States retains jurisdiction over its absent citizens.[11] The United States has the power to serve process over citizens abroad and can require them to attend its courts whenever properly summoned (*ibid*). As its ultimate power, the United States can enforce its penal laws against its citizens for violations of its laws (*ibid*. See also *United States* v. *Bowman*, 260 U. S. 94, 102). Cf. Section 11, Selective Training and Service Act (54 Stat. 894; 50 U. S. C. App. 311) which provides for imprisonment for not more than five years or a fine of not more than $10,000, or both.

In a word, the United States national who resides abroad is never "wholly beyond its jurisdiction and power." (Appellants' Brief, p. 34.) The severance of allegiance of a citizen is, therefore, not at all a recognition of any lack of power of the sovereign over the fugitive draft evader, as suggested by the appellants, but is, as described by Mr. Justice Brennan, nothing more than naked vengeance.

Moreover, the legislative history of Section 401(j) refutes appellants' contention. In his letter to the Chairman of the Senate Immigration Committee the Attorney General stated that:

> "If and when they (draft delinquents) return to this country, it would seem proper that in addition (to the penalties under the Selective Training and Service Act) they should lose their citizenship." (*House Report 1229, supra*, page 2.)

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[11] This is to be distinguished, of course, from the power of extradition which goes to the relation of the United States to a foreign government rather than to a citizen abroad, *supra*, at page 21.

If expatriation is determined *if and when the draft evaders return to the United States* it cannot be argued that the United States is then without power over fugitive draft evaders.

Indeed, appellants concede that the initial determination that a national has been expatriated "will often be made by the Executive Branch, when it seeks to deport him as an alien illegally in the country, or to exclude him from entering the country (if he is outside), or to deny him a passport or some other right available to citizens". (Appellants' Brief, p. 31.) Thus, the nationals whom the government seeks to expatriate not only have not "eluded the grasp of our law", but they are within the direct control of various agencies of the Executive Branch. Appellants' argument that Section 401(j) is a valid exercise of the inherent power of sovereignty cannot be sustained.

V

Section 401(j) Violates Procedural Due Process

It has been noted that Section 401(j) "decrees loss of citizenship without providing any semblance of procedural due process whereby the guilt of the draft evader may be determined before the sanction is imposed". (*Trop*, Opinion of Mr. Chief Justice Warren, 356 U. S. at 94.)

The appellants, in response, concede as true that an administrative agency can determine that a citizen is guilty of draft evasion and has been expatriated, but maintain that the claimant to citizenship is not harmed because he is "entitled to bring a declaratory judgment action to establish his citizenship". (Appellants' Brief, p. 31.)

Even were this a complete statement of an expatriated citizen's procedural rights, it is clearly no substitute for the requirements which due process impose before a citizen of the United States may be denationalized.

Huber v. *Reily, supra,* which this Court approved in *Kurtz* v. *Moffitt, supra* (see *Trop,* concurring opinion of Mr. Justice Brennan, 356 U. S. at 108), requires a trial and conviction upon the charge of desertion before expatriation can be imposed. The force of this opinion was recognized by the Cabinet Committee which proposed the enactment of 401(g), and that provision accordingly provided that expatriation could take effect only following a conviction. Codification of Nationality Laws, H. R. Comm. Print, Pt. I, 76th Cong., 1st Sess.

If due process requires that the deserter be convicted before he may be denationalized, no less can be required for the draft evader.[12] Significantly, although appellants argue that 401(j) does not violate due process, nowhere in their brief do they seek to distinguish the present case from *Huber* v. *Reily.* The principle of the *Huber* case, having received the gloss of approval of this Court as early as 1885 in *Kurtz* v. *Moffitt, supra,* and direct approval in *Trop,* and the imprimatur of Congress when it enacted 401(g), must apply equally to an expatriation under Section 401(j).

Apart from this fundamental defect in Section 401(j), the citizenship claimant's rights in a declaratory judgment proceeding are not protected as fully as the appellants suggest. (Appellants' Brief, pp. 31-32.)

First, it should be noted that Section 503 of the Nationality Act of 1940, 54 Stat. 1137, 1171, 8 U. S. C. 903, was repealed by Section 403(a)(41) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 280, 8 U. S. C. 903.

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[12] It should be noted that appellee's conviction under Section 11 of the Selective Training and Service Act could be solely for "evad(ing) registration or Service" in the armed forces, whereas, the expatriating conduct under 401(j) is for "departing from or remaining outside of the jurisdiction of the United States in time of war * * * or national emergency for the purpose of evading or avoiding training and service." Cf. 54 Stat. 894 with 58 Stat. 746.

Therefore, unless the right of the citizen to bring a declaratory judgment action under that statute has been preserved by the savings clause of the latter statute, 66 Stat. 405, 8 U. S. C. 1101 [Cf. *Dulles* v. *Richter*, 246 F. 2d 709 (C. A. D. C. 1957); *Junso Fujii* v. *Dulles*, 224 F. 2d 906 (9th Cir., 1955)], Section 503 actions are no longer available to citizenship claimants.

This is especially significant for the expatriated citizen who is outside of the United States. While the declaratory judgment procedure is still available to the citizenship claimant under the general Declaratory Judgment Act, 28 U. S. C. 2201, and a review of an agency decision is available under the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. 1009 [see *Frank* v. *Rogers*, 253 F. 2d 889 (C. A. D. C. 1958), and *Tom Mung Ngow* v. *Dulles*, 122 F. Supp, 709 (D. C. 1954)], neither of these remedies assure to the national abroad, who has been ruled expatriated by administrative decision, the right to come to the United States and to appear personally in a judicial proceeding to enforce his claim. (Cf. *Rosasco* v. *Brownell*, 163 F. Supp. 45 (E. D. N. Y. 1958) and cases cited at 50-55.)

An expatriated citizen's right to appear in a court in the United States to testify in support of his nationality derives at present from the provisions of Section 360(b) of the 1952 Act, 66 Stat. 163, 273, 8 U. S. C. 1503. The issuance of a certificate of identity to enable the expatriated citizen to be admitted to the United States is there conditioned upon submitting "proof to the satisfaction of [a] diplomatic or consular officer that such action was instituted in good faith and upon a substantial basis * * * " (*supra*). Thus, the very ability to appear in a court in the United States to prove citizenship is made dependent upon satisfying the consular officer who has expatriated the citizen that the claim is "substantial". At present there is a division in the lower courts whether action lies to compel the Secretary of State to issue a certificate of

identity to an expatriated citizen. (Cf. *Dulles* v. *Lung*, 212 F. 2d 73 (9th Cir. 1954), and *Ling* v. *Dulles*, 119 F. Supp. 513 (D. C. 1954) (action does not lie), with *Sing* v. *Dulles*, 116 F. Supp. 9 (E. D. N. Y. 1953); *Acina* v. *Brownell*, 112 F. Supp. 15, 19 (S. D. Tex. 1953); *D'Argento* v. *Dulles*, 113 F. Supp. 933, 937 (D. C. 1953) (action lies if the refusal is arbitrary or capricious). Even the view most favorable to the expatriated citizen, however, accords the claimant only a review of the administrative refusal, which, needless to say, offers the expatriated citizen far less protection than either an absolute right to appear in court, or a *de novo* determination of his right to appear.

If the expatriated citizen should be unsuccessful in obtaining entry into the United States to testify on his own behalf, the result is the very "spectacle of a trial *in absentia*" which the appellants deplore (Appellants' Brief, p. 32).

But this is not all. If we assume that the expatriated citizen is able to obtain a certificate of identity, what then are his rights? They are set forth at Section 360(c) of the Act, *supra*:

> "A person who has been issued a certificate of identity under the provisions of subsection (b) and while in possession thereof, may apply to the United States at any port of entry, and shall be subject to all the provisions of this Act relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise. Any person described in this section who is finally excluded from admission to the United States shall be subject to all the provisions of this Act relating to aliens seeking admission to the United States."

The expatriated citizen, contrary to appellants' assertion, is not there entitled to a declaratory judgment action. Whether his habeas corpus proceeding entitles him to a *de novo* determination of his claim to citizenship, although appellee welcomes the present concession of the Solicitor General (Appellants' Brief, p. 31), has not yet been firmly settled by this Court. Cf. *United States* v. *Ju Toy*, 198 U. S. 253, and *Tang Tun* v. *Edsell*, 223 U. S. 673, with *Ng Fung Ho* v. *White*, 259 U. S. 276. Compare also *Medeiros* v. *Watkins*, 166 F. 2d 897 (2nd Cir. 1948) with *Carmichael* v. *Delaney*, 170 F. 2d 239 (9th Cir. 1948).

But not even this problem is the end of the expatriated citizen's difficulties. Appellants admit (Appellants' Brief, p. 31) that even in a *de novo* trial, the plaintiff has the initial burden of establishing "the fact of his having been a citizen". Thus, at the very threshold of his case the expatriated citizen, whether abroad or in the United States, like the appellee, is met with a burden, which is upon the Government in all other judicial proceedings involving loss of citizenship. Cf. denaturalization proceedings, *Schneiderman* v. *United States*, 320 U. S. 118, 158; *Baumgartner* v. *United States*, 322 U. S. 665, 675; *Nowak* v. *United States*, 356 U. S. 660, 663; *Maisenberg* v. *United States*, 356 U. S. 670, 672.

In bald words the national who has been expatriated for draft evasion without any prior conviction, without any final sanction by a court, must nonetheless, if he seeks to maintain his right to citizenship, submit himself to the jurisdiction of the courts and agencies of the United States as though he were an alien. If he is an expatriated citizen outside the United States, his posture is that of an alien seeking admission to this country for the first time. Cf. *Shaughnessy* v. *Mezei*, 345 U. S. 205.

It is said that the "alien in this country has very substantial rights and privileges." (*Trop*, dissenting opinion,

Mr. Justice Frankfurter, 356 U. S. at 127.) This may be so, but they are not the rights and privileges which are accorded to citizens as this Court has declared repeatedly from *Fong Yue Ting* v. *United States*, 149 U. S. 698, to *Harisiades* v. *Shaughnessy*, 342 U. S. 580, and *Galvan* v. *Press*, 347 U. S. 522.

What is perhaps more relevant is that whatever rights and privileges aliens may have in this country, this Court, with the exception of its decision in *Chew* v. *Colding*, 344 U. S. 590, from *United States* v. *Ju Toy*, *supra*, to *Shaughnessy* v. *Mezei*, *supra*, and *Leng May Ma* v. *Barber*, 357 U. S. 185, has held, although closely divided, that due process is what Congress says it is for aliens who are not "in the United States".

The United States citizen, who has been denationalized "by the initial determination" of an administrative agency, may therefore, like Mezei, *supra*, be held in detention and afforded no constitutional guaranty of due process at the threshold of the United States, while attempting to vindicate his right to citizenship. It scarcely need be argued that a citizen in such a posture is not able to protect his rights fully. Unlike an accused criminal in the United States, he is not even assured the right to make bail. His proceeding to enforce his claim to citizenship may, in these circumstances, become an empty form. If the slate of this Court in regard to decisions affecting aliens is "not clean" (*Galvan* v. *Press*, 347 U. S. at 531) there seems little justification for eroding the rights of citizens of the United States by marking them down upon the slate which the decisions of this Court have hitherto reserved for aliens.

For the reasons we have given we believe that Section 401(j) is invalid on its face as a violation of the due process clause of the Fifth Amendment. *Stromberg* v. *California*, 283 U. S. 359. *Lovell* v. *Griffin*, 303 U. S. 444.

CONCLUSION

The appellants seek, in effect, to reargue the case of *Trop* v. *Dulles*, 356 U. S. 86, which has recently been the subject of two presentations to this Court. Upon the authority of that case, equally strong, if not stronger, considerations should lead to the invalidation of 401 (j) of the Nationality Act of 1940.

Respectfully submitted,

JACK WASSERMAN,
DAVID CARLINER,
Attorneys for American Civil Liberties Union,
902 Warner Building,
Washington 4, D. C.

Of Counsel:

OSMOND K. FRAENKEL,
ROWLAND WATTS.

APPENDIX

DEPARTMENT OF JUSTICE

Washington 25, D. C.

December 5, 1944

CIRCULAR No. 3893

TO ALL UNITED STATES ATTORNEYS AND ALL FIELD OFFICES OF THE FEDERAL BUREAU OF INVESTIGATION AND THE IMMIGRATION AND NATURALIZATION SERVICE

Re: Public Law No. 431 (78th Congress): An Act to expatriate or exclude certain persons for evading military and naval service.

The above-mentioned Act (1) provides for automatic expatriation of a citizen of the United States who departs from, or remains outside of, the country during time of war or national emergency for the purpose of avoiding or evading military service, and (2) prohibits reentry to the United States of any alien who departed from the United States for the same purpose.

A substantial number of Selective Service delinquency cases involving aliens or dual-citizens who registered under the Selective Service Act while residing in the United States and who have since departed therefrom for the apparent purpose of evading military service are now being carried in a pending status by the United States Attorneys and the Field Offices of the Federal Bureau of Investigation. Extradition for prosecution in such cases is impossible.

It is anticipated that many such delinquents will attempt to return to the United States as the probability of being called for service becomes more and more remote. Under Public Law No. 431, such delinquents are ineligible for reentry, either as debarred aliens or expatriates, and in order that their cases may be closed in the offices of the United States Attorneys and the Federal Bureau of Investigation, the following procedure is suggested and authorized:

(1) The United States Attorney shall examine his file and the investigative reports in each case, and upon determination that Public Law No. 431 is applicable, shall close the case, and notify the Field Office of the Federal Bureau of Investigation of his action.

(2) The Federal Bureau of Investigation will thereupon close its file in the case and furnish the Immigration and Naturalization Service with all information pertinent to the application of Public Law No. 431, and the application of the law from an administrative viewpoint shall thereafter be the responsibility of the Immigration and Naturalization Service.

(3) The United States Attorney shall notify the State Director of Selective Service of the names, order numbers and Local Boards of all such closed delinquency cases so this his records and those of the Local Boards may be appropriately noted.

The cases of United States citizens (other than so called dual citizens) who may have departed from or remained outside of the United States for the purpose of avoiding military service require different treatment than the cases of aliens or dual citizens. Such cases should be continued in a pending status at the present time so that consideration may be given to the matter of prosecution in the event of subsequent apprehension in the United States. At the same time, however, the facts in all such cases should also be made available by the Federal Bureau of Investigation to the Immigration and Naturalization Service and also, where appropriate, to the State Department.

Where any doubt is entertained as to the disposition of any delinquency case which may fall within the purview of Public Law No. 431, the matter should be taken up with the Criminal Division in the Department.

FRANCIS BIDDLE
Attorney General

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 29

ARGYLE R. MACKEY, Commissioner of Immigration and Naturalization, and WILLIAM P. ROGERS, Attorney General of the United States, *Appellants*,

v.

FRANCISCO MENDOZA-MARTINEZ, *Appellee*.

On Appeal from the United States District Court for the Southern District of California, Northern Division

BRIEF FOR THE APPELLEE

JOHN W. WILLIS
1735 DeSales St., N. W.
Washington, D. C.

VINCENT P. DIGIORGIO
THOMAS R. DAVIS
1021 Chester Avenue
Bakersfield, California

Counsel for Appellee

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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---

BRIEF FOR THE APPELLEE

PRELIMINARY STATEMENT

The issues of law in the present case have already been exhaustively argued before this Court. We have ourselves appeared in two other cases as *amicus curiae* to urge our own contentions. It does not seem likely, at this juncture, that authorities of major importance

can be cited which have not already been carefully noted and considered by the Court. The governing principles have been established. It is our task now to urge our cause "in the light of *Trop* v. *Dulles*" and, inevitably, in the shadow of *Perez* v. *Brownell*. Therefore we intend, as far as possible, not to burden the Court with repetitive assertions and citations. It is hoped that what would otherwise appear to be a poverty of authorities and precedents will be countenanced under the circumstances.

Counsel for the government have accurately and without coloration complied with the requirements of Rule 40(1) a through e. No supplementation is necessary.

SUMMARY OF THE ARGUMENT

1. Section 401(j) was not enacted in the exercise of the foreign affairs powers of Congress. The type of conduct described in Section 401(j) creates no confusion as to the citizenship status of the individual involved. The presence of a draft evader in a foreign country is not likely to result in "foreign embroilments" or to embarrass the United States, nor is expatriation an appropriate method of resolving international complications if they should arise. Leaving the country in order to avoid the draft cannot reasonably be said to show an abandonment of allegiance to the United States.

2. Section 401(j) does not represent a valid exercise of the war powers of Congress. Conventional penal sanctions are adequate to accomplish Congress' purpose of deterring draft evasion, whether accomplished by leaving the country or by other means. There

is no logical or rational connection between expatriation and the war powers.

3. Section 401(j) is a penal, punitive measure. As such, it does not comply with the requirements of due process of law. The right to bring an action for declaratory relief under Section 503 of the Nationality Act does not compensate for the lack of due process implicit in Section 401(j). Expatriation as a punishment for draft evasion constitutes a cruel and unusual punishment. That the appellee may, through no choice of his own, have possessed dual nationality, is irrelevant.

ARGUMENT

I

SECTION 401(j) CANNOT BE JUSTIFIED AS AN EXERCISE OF THE POWER OF THE SOVEREIGN TO CONDUCT FOREIGN AFFAIRS

A. Indications From the Statutory Language

There is a serious cause for doubting the applicability of the foreign affairs power on the very face of the statute. The act which results in expatriation is defined as "departing from or remaining outside of the jurisdiction of the United States." If embarrassment in foreign relations was truly the concern of Congress, this was most surely an awkward, inaccurate statement in the negative. This statute should have read "entering into or remaining in any foreign state" or some such equivalent language. Under 401(j) a citizen could be expatriated by nothing more than taking to the high seas (beyond the 12-mile limit) to escape pursuing authorities, or by journeying to wholly uninhabited and ungoverned territory. He would surely have "departed from the jurisdiction of the United States", and yet he would have had no involvement whatever with any foreign nation.

Equally it is difficult to conceive (if Congress had in mind the foreign affairs power) why it was provided that expatriation would only result "in time of war or during a period declared by the President to be a period of national emergency". Conceivably, the presence of deserters from American armed forces in a neutral or passively hostile nation might be more significant in time of war than in time of peace. But 401(j) deals with civilian draft evaders, with fugitives no different from others seeking to escape the application of the United States penal statutes. Even if it is assumed *arguendo* that the presence of these civilian fugitives in a foreign land could, in some still undefined manner, embarrass our government in the conduct of its foreign affairs, it remains hard to imagine why the problem should be peculiar to wartime. If diplomatic embarrassment might somehow result, it would seem just as likely a hazard in time of peace, when diplomacy is the primary weapon. Had Congress truly contemplated the facilitation of international relations, this would have been an unlikely limitation to place on the statute.

These considerations are preliminary in character, but they justify an initial degree of skepticism about the relevance of the foreign affair power.

B. Precedents Bearing on the Applicability of the Foreign Affairs Power

The two precedents which bear directly on the applicability of the foreign affairs power are, of course, *MacKenzie* v. *Hare*, 239 U. S. 299, and *Perez* v. *Brownell*, 356 U. S. 44. In both cases the task confronting Congress was to deal with a clearly definable, concrete problem in foreign affairs: The separation of the sheep from the goats, the need to delineate, unmistakably, between citizens and non-citizens abroad.

There was nothing abstract about it. In both cases the Court recognized that when a citizen committed an act which could cause confusion as to his citizenship status, the government had a right to free itself from the embarrassment that might result by setting up clear standards for determining citizenship or the forfeiture thereof. In *MacKenzie* the ambiguity was caused by the marriage of an American citizen to an Englishman. Was she still an American citizen, or had she, by becoming one with her husband, declared her allegiance to Great Britain? In *Perez* the question was whether the petitioner's act of voting in a politically significant election had created such an ambiguity. Had he thereby transferred or diluted his allegiance?

But the Court has thus far limited itself to this single problem of differentiating between citizen and non-citizen, and it has evidenced (by its language in *MacKenzie* and its decision in *Trop*) a reluctance to go further. We urge that any extension of the *Perez* rule should require at least an equally direct relation to some specific aspect of foreign affairs.

C. The Rule in Perez Cannot Reasonably be Extended to Cover the Instant Statute

The potential embarrassment of the government apprehended by the majority in *Perez* to justify compulsory expatriation was that which would arise from the ambiguity as to citizenship created by voting in a foreign election. The contrasting situation in the present case was well defined by the trial court in its opinion on remand:

> "While physically present in Mexico the petitioner did no act which would import a dilution of his citizenship or which might conceivably em-

> barrass our government. So far as the record in this case shows the conduct of the petitioner in Mexico was no different from the conduct of law-abiding American citizens who were lawfully in Mexico on visas or passports." (R-10)

Common experience and common sense dictate that the trial court's characterization would be accurate for draft evaders generally. The government has suggested no conduct reasonably to be expected of them which could give rise to international complications.

To fill this gap the government seems to argue that the international complications anticipated by Congress were those which would ensue when the United States insisted on getting its draft evaders back. (Appellant's Brief page 20) But we are not told why it is that the United States would be under irresistible compulsion to create, by its own act, the very friction which the statute is allegedly designed to cure. It explains nothing to say that "In times of war or national emergency, when the need for manpower is great, the United States *could well feel called upon* to make representations or to bring pressure upon certain nations to make sure that they do not become refuges or centers for American draft evaders." The United States is not "called upon" to go out and manufacture difficulties for itself, no matter what the national emergency. It remains a free agent to conduct its affairs responsibly in its own best interest. In dealing with the problem of draft evaders in a foreign nation it may press its cause with that nation or it may not as wisdom dictates. Surely it is the impact of *Perez* that this Court must consider those international troubles which the United States may reasonably

be expected to have to cope with, not those which, within the scope of imagination, it might arbitrarily stir up.

More specifically with regard to the present appellee and the several hundred others like him, the government does not even attempt to show that such draft evaders ever constituted a real problem in the actual relationship between the United States and Mexico, during World War II or in any other period. Indeed it fails to cite a single concrete instance of national embarrassment arising from the presence of a fugitive from American draft laws in a foreign country throughout the entire history of the nation.

The "foreign mbroilments" relied by the government in this connection are a part of the distant past and are unrelated to the military and diplomatic realities of the 1959 world. But more than this, even in the nineteenth century the "embroilments" arose from the impression of Americans into the military service of foreign nations, not the efforts of the United States to enforce its own draft laws. It is a long reach indeed to attempt to rationalize 401(j) in terms of the War of 1812.

And where the expatriating act raises no question as to status of citizenship, it is obscure how expatriation facilitates relations with the nation within whose boundaries the fugitive is lodged. Section 401(j) should be judged not only in terms of appellee but in the light of its general application. If the fugitive in Mexico is named Jones and comes from Vermont, the burdens on the government of Mexico will hardly be lightened by transforming its visitor from an American citizen into a stateless wanderer, whose status poses intricate and perplexing problems, both

legally and practically. The net effect will be to create for Mexico a headache of impressive proportions.

The conduct involved here cannot rationally be connected with the foreign affairs of the United States. Draft evaders abroad could reasonably be expected to cause no more nor less embarrassment to the government than tax evaders or gallows evaders. The *Perez* rule should be limited to encompassing only those acts which might impede the government in the conduct of its foreign affairs by creating an ambiguity as to citizenship, *or at least to encompassing only those acts which are relatable in similarly concrete terms to similarly specific aspects of foreign affairs.*

D. Draft Evasion by Flight From the Country Is Not Rationally Related to Abandonment of Allegiance

There is a concluding point to be made which has particular reference to the dissenting memorandum of Mr. Justice Whittaker in *Perez*. He relied in part, on his belief that the act of voting legally in a foreign election could not "be reasonably said to constitute an abandonment or any division or dilution of allegiance to the United States." (356 U. S. 88). The point would seem all the more applicable here. The refuge chosen by the draft evader is an accident of geographical location. The young man of Mexican ancestry who crosses the border to find harbor with relatives or friends, like the Kentucky boy who takes to his neighboring hills, evidences only one thing—a desire to escape. To vote, even legally, in a foreign election carries with it an arguable connotation of ambiguity in allegiance, but the draft evader who flees the country

shows nothing more than a fear of the consequences of military service, or of impending punishment.

II

SECTION 401 (j) CANNOT BE JUSTIFIED AS A NECESSARY AND PROPER ENACTMENT UNDER THE WAR POWERS

A. Extent of Departure From Present Law If Held Constitutional

The government places major emphasis on the contention that Section 401(j) was a justified enactment under the war powers. We believe it is important to suggest at the outset the extent to which a ruling would be breaking new ground. Whether the section is "penal" in the strict sense is a question we will be required to deal with later. Our present point is that while the purpose of Congress in *MacKenzie* and *Perez* was the differentiation of citizens and non-citizens, a decision upholding constitutionality here would for the first time sanction the use of expatriation for the naked purpose of coercion and compulsion. The yardstick is now to be replaced by a club. It is the crux of our present task to establish that such a departure is not justified and that the principles sustaining the decision in *Trop* are equally applicable here.

B. The Importance of "Departing From or Remaining Outside of the Jurisdiction of the United States"

Able counsel for the government do not argue, in the face of *Trop*, that draft evasion *as such* would be sufficient ground for imposing loss of citizenship. Understandably, they contend that the crucial distinction lies in the requirement that the draft evasion be accomplished by departing from or remaining outside of the country. The main thrust of the argument is that the

ordinary punitive remedies are ineffective against such offenders.

The answer to this is that the loss of citizenship by the fugitive will only be felt by him, in plain fact, when, and only when, he attempts to return to the United States. To imagine that such a felon, hiding in a foreign land from American justice, would place any substantial reliance on his citizenship or make demands upon his government is, at the very least, highly fanciful. Casting about for some historical precedent to endow this suggestion with a degree of plusibility, the government calls attention to an 1863 letter of Secretary of State Seward. (Appellant's Brief page 23) But in the next breath it is required by candor to admit that the people involved were not fleeing fugitives from a federal criminal statute: "There was not, during that period, any law forbidding flight in order to avoid service."

The day of reckoning (if there ever is to be one) is therefore the day the offender approaches the border to come home. It is indistinguishable in this respect from a conventional penal statute. And on that day of reckoning a sufficiently stringent conventional penal statute would be demonstrably more effective. Congress could provide that a draft evader who leaves the country for that purpose must suffer life imprisonment or, for that matter, it could provide that he be hanged. A statute of limitations could be enacted which would make it virtually impossible for him to avoid the impact of the law. Would the returning offender then be more concerned about being declared an alien than with being incarcerated for the remainder of his life or of having his life terminated?

To put it differently, if the offender fleeing to foreign soil has no intention of returning, he will be little concerned either with loss of citizenship or with the harshest of penal sanctions threatened by his native land. But if he does anticipate returning, after having "accomplished his purpose and avoided service in the time of danger" (Appellant's Brief, page 26), will he be more concerned with deportation than with a total loss of life or liberty?

The government further contends, by way of a footnote on page 26 of its brief, that "even after flight abroad, Section 401(j) would act as a goad to return, since it has been broadly read to the advantage of those who return (after initial flight) while the war or emergency still continues." So equally could a penal statute be "broadly read", or it could be expressly written thus. A draft evader who left the United States but later repented and did his service could equally have been excepted from the full impact of such a penal statute.

Of course, the penalty for draft evasion involving departing or remaining outside the United States during World War II was not in fact as harsh as the one just suggested. The point is that it could have been. Congress had means at its disposal at least as effective as expatriation. *Just as in* Trop *it can be said that "These ends could be more fully served by alternative methods not open to these objections."* (Concurring opinion of Mr. Justice Brennan in *Trop v. Dulles*, 356 U. S. 86, 114).

Departure or absence from the United States on the part of the draft evader is not a special circumstance justifying the upholding of 401(j).

C. The Absence of a Rational Nexus Between Expatriation and the War Powers

There is ample cause for finding a lack of logical connection between Section 401(j) and the war powers. The desertion of a trained soldier is clearly more damaging to the war effort than the "desertion" of a potential soldier. If desertion in *Trop* had no rational nexus, this should be all the more so the case here. Moreover, expatriation automatically severs the draft evader's tie with the United States and therefore *discourages* his return to serve in the military, and the termination of citizenship by expatriation completely destroys any hope of obtaining his return by extradition or diplomatic negotiation. There was more rationality in the approach of an earlier Congress, which expressly *suspended* expatriation during wartime. (34 Stat. 1228; 1907) It is exactly then, said Secretary of State Fish, that "The government should be able to control the services of every citizen." (House Doc. 326, 59th Cong., 2nd Session, page 28)

But the government writes: "Unlike desertion, which carries the primary sanction of court-martial and imprisonment, no similar primary check exists to deter those individuals who would otherwise flee this country to avoid fulfilling their military obligations. Draft evaders outside the country cannot be apprehended there and imprisoned for their departure or failure to return." (Appellant's Brief, page 25)

The refutation of this has already been spelled out. Neither expatriation nor criminal punishment will have any impact unless and until the fugitive comes home. If he has gone for good, neither will cause him any apprehension. If, on the other hand, he contemplates

returning, the penal statute is equally capable of being there to greet him.

It would seem almost superfluous to add that desertion may *or may not* carry "the primary sanction of court-martial and imprisonment" in the sense argued by the government. American armed forces have been, and are stationed around the world in a myriad of different circumstances. In many of those circumstances a deserting soldier virtually instantaneously places himself beyond the effective jurisdiction of the United States. His return on an involuntary basis must be achieved, if at all, by reliance on treaties, agreements, extradition proceedings or diplomatic negotiations, *exactly as in the case of the draft evader in Mexico.*

And the nexus is lacking in an even more important sense. The crucial opinion in *Trop* was the restricted concurrence of Mr. Justice Brennan. A major reason given by the Justice for denying the constitutionality of the desertion statute was that it was patently, on the record, an ineffective deterrent. In both past and present argument counsel for the government has wholly failed to show how the sanction of loss of citizenship could be ineffective in the case of a deserter but effective in the case of the draft evader who departs the country. ***On what basis is the Court to conclude that the draft evader, as opposed to the deserter, would have any different degree or kind of fear of the promised consequence?***

III

THE STATUTE HAS FATAL INFIRMITIES RESULTING FROM ITS PENAL CHARACTER

A. Section 401 (j) Is a Penal Statute

The government makes little more than a perfunctory effort to urge that draft evasion involving a departure from the United States actually creates an ambiguity as to citizenship. It is not seriously urged that the purpose of 401(j) is to distinguish citizens from non-citizens. For the most part counsel are frank in asserting (Pg. 25 et seq. of Appellant's Brief) that the statute was enacted to provide an "immediate deterrent". Of course the distinction between penal and non-penal statutes is a technical one and the use of the word "deterrent" is not in itself enough, but there is much more here.

Congress has been candid in characterizing such a sanction as punitive. The 1865 Act, so emphasized by the government, frankly labeled loss of the rights of citizenship a "penalty". (Appellant's Brief, page 17)[1] At the time of enactment of Section 401(j) in 1944 the legislators made it equally clear that their purpose was to enact a penal statute. Thus, Senator Russell said (90 Cong. Rec. 7629):

> "Information before the committee indicated that on one day several hundred persons departed from the United States through the city of El Paso, Tex., alone, in order to avoid service in either the Army or the Navy of the United States, and to avoid selection under the selective-service

[1] The Supreme Court, referring to the same statute in 1885, also characterized it as punitive: "The provisions . . . subject every person deserting the military service of the United States, to *additional penalties*, namely forfeiture of all rights of citizenship. . . ." *Kurtz* v. *Moffitt*, 115 U.S. 487, 501.

law. This bill provides that any person who is a national of the United States, or an American citizen, and who in time of national stress departed from the United States to another country to avoid serving his country, shall be deprived of his nationality.

"It further provides that any alien who is subject to military service under the terms of the Selective Service Act, and who left this country to avoid military service, shall thereafter be forever barred from admission to the United States.

"Mr. President, I do not see how anyone could object to such a bill. An alien who remains in the country and refuses to serve in the armed forces in time of war is prosecuted under our laws, and if found guilty he is compelled to serve a term in the penitentiary. Under the terms of the Selective Service Act an American citizen who refuses to serve when he is called upon to do so is likewise subject to a prison term. Certainly those who, having enjoyed the advantages of living in the United States, were unwilling to serve their country or subject themselves to the Selective Service Act, should be penalized in some measure. This bill would deprive such persons as are citizens of the United States of their citizenship, and, in the case of aliens, would forever bar them from admission into the United States. Any American citizen who is convicted of violating the Selective Service Act loses his citizenship. This bill would merely impose a similar penalty on those who are not subject to the jurisdiction of our courts, the penalty being the same as would result in the case of those who are subject to the jurisdiction of our courts."

See also the remarks of Rep. Dickstein, Chairman of the House Immigration Committee, 90 Cong. Rec. 7725-26.

The draft evader who loses his citizenship by leaving the United States faces a federal prison sentence for his offense when he returns (as the voter in a foreign election does not). And just as significantly, he suffers this loss of the single right which is the keystone of all of his other protections for no governmental purpose other than the hoped-for dissuasion of others, of like mind.

Beyond all this, ostracism, or banishment, was among the earliest of the primitive punishments devised by man. Its abandonment was a relatively recent development in the administration of justice, one which is usually regarded as a triumph of enlightment over the traditions of barbarism.[2] *It is strange indeed to see designated as mere "regulation" in 1959 that which was among the harshest and least humane of punishments during the greater part of recorded history.* Surely there can be little left of punishment in the constitutional context if this is not such.

B. The Statute Does Not Adequately Provide for Procedural Due Process

If we are in fact dealing with the imposition of a penal statute here, it becomes relevant to ask whether the requirements for due process of law were met. The government argues that procedural due process was satisfied because this appellee had the right to bring an action for declaratory relief under Section 503 of the Nationality Act of 1940. (Appellant's Brief page 31) It is no longer extensively argued that

[2] Pertinent text material on this subject is to be found in "Punishment and Reformation", by Frederick Howard Wines, Chapter V, "Intimidation and Torture", particularly at pages 85-86.

appellee's criminal trial for draft evasion is relevant, for it is, no doubt, now recognized that he was tried under a statute punishing draft evasion as such, not flight from the country for that purpose. The judgment against him therefore could not support expatriation. Moreover, Section 401(j) itself contains no provision for a criminal trial, so that its occurrence here was accidental.

Section 503, now relied on, totally fails to satisfy the requirements of due process in criminal proceedings. It was not a mandatory protection here; appellee only obtained his trial pursuant to it by making a demand for it after an administrative board ruled against him. More importantly, there was no privilege of trial by jury, or to refuse to testify against himself, or to have those other protections which are fundamental to criminal proceedings, since the section provides simply for a civil suit in equity to obtain declaratory relief.

C. Expatriation Under 401 (j) Is Cruel and Unusual Punishment

For the most part, in dealing with the subject of cruel and unusual punishment, we shall limit ourselves to inviting the Court's attention once more to Stephen J. Pollak's masterful analysis in 64 Yale Law Journal 1187 to 1194.[3] There are but two additional points to be made. The government contends, we believe now for the first time, that there is no cruel and unusual punishment in a case like the present one because appellee is a national of Mexico by virtue of the laws of Mexico. Therefore, presumably, he is not being set adrift in the world to become a man without a country

[3] It would seem proper to note that Mr. Pollak has given unstintingly of his time and energies in providing suggestions for the present brief.

but is merely being transferred to another country of which he is also a citizen.

Is it then to be understood that a foreign parliament or other authority may create in this country, on whatever ground it may choose, a special class of citizens who are subject to deportation for a given act, while their fellow citizens are not? *Appellee here is a citizen of Mexico only because the Mexican government says so, not because of any voluntary act or choice of his own.* He was born in the United States and bases his claim of citizenship on that fact. It is submitted that to seek to avoid the injunction against cruel and unusual punishment by invoking the citizenship which a foreign government has thrust upon an American is to jump from the pan into the fire; such a distinction plainly carries with it a denial of equal protection of the laws.

More than this, the technical fact of citizenship in a foreign land may or may not import that the fugitive will have harbor there. He may be *persona non grata* for political reasons totally abhorrent to Americans; indeed he may be refused refuge for the very reason that he has previously evidenced his allegiance to the United States.

The second point is one which might be crucially important when the final balance is struck. We refer to an aspect of the concurring opinion of Mr. Justice Brennan in *Trop* v. *Dulles*. Nowhere does the Justice explicitly say that he finds Section 401(g) invalid because it constitutes cruel and unusual punishment, but it is respectfully urged that this is a necessary result from his other conclusions: he finds unequivocally that the statute is punitive and penal in character, but he finds equally that the imposition of this punish-

ment, in all of its severity, is useless for the purpose it attempts to achieve and that that purpose could be achieved by other methods. *Is this not cruel and unusual punishment in its very essence, where a harsh and onerous penalty promises neither rehabilitation of the offender nor the deterrence of others of like mind?*

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court below should be affirmed.

Respectfully submitted,

DiGiorgio and Davis
by Thomas R. Davis

Fischer, Willis & Panzer
by John W. Willis

SUPREME COURT OF THE UNITED STATES

No. 29.—October Term, 1959.

Mackey, Commissioner of Immigration and Naturalization Service, et al., Appellants, *v.* Francisco Mendoza-Martinez.	On Appeal From the United States District Court for the Southern District of California.

[April 18, 1960.]

Per Curiam.

This is a suit by appellee for a declaratory judgment that he is a citizen of the United States. The District Court sustained the contention of the United States that appellee had lost his citizenship by reason of § 401 (j) [1] of the Nationality Act of 1940, 54 Stat. 1137, as amended, 58 Stat. 746, 8 U. S. C. § 1481 (a) 10, and the Court of Appeals affirmed. 238 F. 2d 239. Meanwhile we had decided *Trop* v. *Dulles*, 356 U. S. 86; and when certiorari was sought here we granted the petition and remanded the cause to the District Court for reconsideration in light of that decision. 356 U. S. 258. On remand the District Court held that § 401 (j) was unconstitutional. The case is here on direct appeal (28 U. S. C. § 1252) from the judgment of the District Court holding that appellee is therefore a citizen of the United States. We noted probable jurisdiction. 359 U. S. 933.

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[1] Section 401 (j) reads as follows:

"A person who is a national the United States, whether by birth or naturalization, shall lose his nationality by:

"(j) Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States."

After the case was argued the Court, *sua sponte*, put to the parties the following questions based on appellee's conviction for draft evasion: [2]

"(1) Was the judgment of conviction of appellee for draft evasion premised in any respect upon his citizenship status after the date of enactment of Section 401 (j)?

"(2) If so, does the judgment of conviction for any reason foreclose litigation of the appellee's citizenship in the present case?

"(3) Are the foregoing questions appropriate for the Court's consideration?"

The parties have filed supplemental briefs and from them it appears that the offense charged, and to which appellee pleaded guilty, was departing from the United States November 15, 1942, to evade service in the Armed Forces and remaining away until November 1, 1946. The statute under which he was convicted placed the duty of service on "every male citizen of the United States.

[2] The facts stipulated in the present case and relevant to that conviction are:

"III. Plaintiff was born in the United States on March 3, 1922, and thus was a citizen of the United States by birth.

"IV. Under the laws of Mexico plaintiff is now, and ever since his birth has been, a citizen and national of the Republic of Mexico.

"V. During 1942 plaintiff departed from the United States and went to Mexico for the sole purpose of evading and avoiding training and service in the Armed Forces of the United States.

"VI. Plaintiff remained in Mexico continuously from sometime during 1942 until on or about November 1, 1946 for the sole purpose of evading and avoiding training and service in the Armed Forces of the United States.

"VII. On June 23, 1947, plaintiff upon his plea of guilty was convicted in the United States District Court for the Southern District of California for violation of Section 11 of the Selective Service and Training Act of 1940. He was sentenced to imprisonment for a period of one year and one day."

and every other male person residing in the United States." 54 Stat. 885, as amended, 55 Stat. 844, 50 U. S. C. App. 303 (a) (1940 ed. Supp. I).

Appellee contends that while that Act requires service of aliens residing here, it is inapplicable to nonresident aliens; and that therefore the charge in the indictment that appellee remained away could be applicable only if appellee were a citizen. Indeed the facts stipulated in the present case state that he was a citizen by birth. It follows, appellee argues, that the judgment of conviction for draft violation necessarily included an adjudication of citizenship, and that that judgment brings into play the doctrine of collateral estoppel (*Washington Packet Co.* v. *Sickles*, 5 Wall. 580; *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558) since the conviction of draft evasion was subsequent to September 27, 1944, the date of the enactment of § 401 (j). The Solicitor General argues, *inter alia*, that the issue of citizenship was not necessarily involved in the conviction for draft evasion since a charge of evasion by an alien would be made out even though he had left the country provided the duty to serve had attached when he resided here. The Solicitor General suggests, however, that the avoidance of a constitutional issue when not clearly necessary and the importance of citizenship to the appellee are important factors to be considered in disposing of the case. He is of the view that "there is so little ground for saying that appellee's citizenship status has already been definitively decided, we believe that this issue should not and need not be canvassed by the Court." Yet with his customary candor the Solicitor General says: "But if the Court should be convinced on this record that appellee's citizenship was authoritatively determined in his favor in the 1947 criminal proceeding, we would not oppose a resolution of the case on that basis."

The issue of collateral estoppel is a question that clouds the underlying issue of constitutionality. Since the issue of collateral estoppel may be dispositive of the case, we remand the cause to the District Court with permission to the parties to amend the pleadings, if they so desire, to put in issue the question of collateral estoppel and to obtain an adjudication upon it.

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Mr. Justice Clark, whom Mr. Justice Harlan and Mr. Justice Whittaker join, dissenting.

This case having now been in the courts for some six years, we think that proper judicial administration would require the Court to decide the question of collateral estoppel, raised belatedly and *sua sponte*. As we see it, if the Court can raise that issue here, certainly we can decide it without the additional delay of having the parties go through the motions of amending the pleadings, as suggested. The Court could then pass upon the constitutional issue and advise the Congress of its power in this important field, in which it legislated some 16 years ago.

SUPREME COURT OF THE UNITED STATES

No. 29.—October Term, 1959.

Mackey, Commissioner of Immigration and Naturalization Service, et al., Appellants, v. Francisco Mendoza-Martinez.	On Appeal From the United States District Court for the Southern District of California.

[April 18, 1960.]

Separate memorandum of Mr. Justice Frankfurter.

The Solicitor General's acquiescence in having this case disposed of by avoiding decision of the important constitutional question concerning the validity of § 401 (j) of the Nationality Act of 1940, which is the only one presented by the record, probably reflects an understandable desire on the part of the Government to have this Court adjudicate that issue unembarrassed by an extraneous problem that did not come to the surface until this appeal had been submitted. I do not think that this new matter—a claim of collateral estoppel—should be considered here as though this were a court of first instance. No matter how sympathetic one may be towards liberalization of pleading and informality in judicial proceedings, the intrinsic demands of orderliness in the judicial process require that the issues on which this Court is to render judgment should be appropriately defined through pleadings and proceedings in the lower courts and not be initially shaped for adjudication in this Court. Apart from all else, since taking testimony before this Court has long since ceased to be feasible, we would necessarily have to act on the merits of a claim, based on the rather opaque law of collateral estoppel, resting on documentary submissions not subject to the test of testimonial examination.

I am prepared, therefore, to accede to the Solicitor General's suggestion, but to do so by wiping the slate clean. This calls for an appropriate order vacating the proceedings in this Court and in the District Court for the Southern District of California as well as the deportation proceedings which derived from a finding that the appellee has lost his citizenship by reason of § 401 (j) of the Nationality Act, a conclusion which is the very issue in controversy. I would do so without summarizing the positions of the parties on the claim of collateral estoppel which is not relevantly before us on this record, and, above all, without any intimation regarding the seriousness of such a claim.